TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 118

INDUSTRIAL ADDITION ASSOCIATION,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 2, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT.

No. 9629.

INDUSTRIAL ADDITION ASSOCIATION,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

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[fol. 1] United States Circuit Court of Appeals Sixth Circuit Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Docket Entries.

APPEARANCES:

For Taxpayer: H. A. Mihills, C.P.A.

For Comm'r: Frank M. Thompson, Jr. Esq., R. C. Whitley, Esq.

1940

Jul. 10—Petition received and filed. Taxpayer notified. Fee paid.

Jul. 10—Copy of petition served on General Counsel.

Jul. 10—Request for Circuit hearing in Memphis, Tennessee, filed by taxpayer. 7-10-40 Copy served.

Sep. 3—Answer filed by General Counsel.

Sep. 9—Copy of answer served on taxpayer. Memphis, Tennessee.

1942

Mar. 11—Hearing set April 20, 1942, Memphis, Tennessee.

Apr. 22—Hearing had before Mr. Arundell on merits. Submitted. Stipulation of facts and Memo. of Tennessee Statutes filed. Briefs due under rule; simultaneously, 45 days; replies 15 days.

May 7—Transcript of hearing 4-22-42 filed.

Jun. 3—Motion for extension to 7-6-42 to file brief, filed by General Counsel. (6-4-42 granted.)

Jun. 6—Motion for extension of time to 7-6-42 to file brief, filed for taxpayer. 6-8-42 granted.

Jul. 6—Motion for extension of time to 7-16-42 to file brief, filed by taxpayer. 7-7-42 Granted to 7-27-42.

Jul. 6—Motion for extension of time to 7-27-42 to file brief, filed by General Counsel. 7-7-42 Granted.

Jul. 27—Brief filed by taxpayer. 7-28-42 copy served on General Counsel.

Jul. 27—Brief filed by General Counsel. 7-28-42 Served.

Dec. 30—Findings of fact and opinion rendered. Arundell, Judge, Div. 7. Decision will be entered under Rule 50. 1-2-43 copy served.

1943

Feb. 5—Computation of deficiency filed by General Counsel.

Feb. 9—Hearing set March 10, 1943 on settlement.

Mar. 10—Hearing had before Judge Murdock on settlement under Rule 50. Respondent's computation not contested. Referred to Judge Arundell for decision.

Mar. 12—Decision entered. Arundell, Judge, Div. 7.

Jun. 11—Petition for review by U. S. Circuit Court 6th Circuit, filed by taxpayer.

Jun. 11—Statement of points on which petitioner intends to rely on review, filed by taxpayer with proof of service thereon.

Jun. 12—Notice of filing petition for review and statement of points sent to J. P. Wenchel, filed.

[fol, 2] 1943

Jun. 14—Proof of service of filing petition for review and statement of points. (J. P. Wenchel) filed.

Jul. 12—Stipulation of venue filed.

Jul. 20—Motion for extension to 9-9-43 to transmit record, filed by taxpayer.

Jul. 20—Order enlarging time to Sept. 9, 1943 to prepare and deliver record entered.

Aug. 16—Statement of evidence filed by taxpayer.

Aug. 16—Praecipe with proof of service thereon filed by taxpayer.

[fol. 3] Endorsed: Filed July 10, 1940

United States Board of Tax Appeals Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753.

Petition.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 16, 1940, and as a basis of its proceeding alleges as follows:

(1) The petitioner is a corporation with principal office at Dyersburg, Tennessee. No returns for the periods here involved were filed.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 16, 1940.

(3) The taxes in controversy are as follows:

Year	Income Tax	Excess Profits Tax	Penalty	Total
1932	$640.74	$	$ 160.19	$800.93
1933	177.05	64.38	60.36	301.79
1934	2,327.44	846.34	793.45	3,967.23
1935	4,339.50	1,578.00	1,479.38	7,396.88
1936	1,080.68	882.33	490.75	2,453.76
	$8,565.41	$3,371.05	$2,984.13	$14,920.59

(4) The determination of tax and penalties set forth in the said notice of deficiency is based upon the following errors:

(a) The petitioner is exempt from tax under provisions of Section 101 (7) or Section 101 (8) of the 1934 and 1936 Revenue Acts and similar provisions of Section 103 of the 1932 Act.

[fol. 4] (b) Respondent, in notice of deficiency, does not provide for the allowable deductions enumerated below:

(1) Interest paid on money borrowed (other than bond interest) amounting to $506.94 and $102.78 respectively for the years 1932 and 1933.

(2) State and county taxes paid in 1934 amounting to $211.40.

(3) Interest paid on the certificates of beneficial ownership as follows:

1932	$1,125.00
1933	2,061.00
1934	3,537.00
1935	1,827.00
1936	1,863.00

(4) Amortization of bond discount ($7,500.00) as follows:

1932	$ 882.35
1933	801.47
1934	713.24
1935	625.00
1936	536.76

(c) That the deficiency with respect to excess-profits tax aggregating $3,371.05 plus relative penalty of $842.77, as determined by the respondent, is erroneous, since the petitioner was not "doing business" in any of the years here involved, and therefore would not be subject to such tax.

(5) The facts upon which the petitioner relies as to the basis of this proceeding are as follows:

(a) That during the year 1926, or thereabout, the Chamber of Commerce and certain business men and other individuals of the City of Dyersburg, Tennessee, were desirous of inducing industry to locate in Dyersburg or its vicinity in order to augment commercial activity for the benefit of the community in general.

[fol. 5] (b) That the Industrial Addition Association was incorporated under the laws of Tennessee in 1926 for the purpose of accomplishing the aims set forth in subparagraph (a).

(c) That the charter provides that the general welfare of society, not individual profit, is the object for which the charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members.

(d) That in March, 1928, a contract was entered into whereby certain cotton mills then located in Michigan and New York agreed to move their operations to Dyersburg, and the petitioner agreed to donate a tract of land for use as a mill site and also agreed to donate cash funds amounting to $100,000.00 to defray expenses involved in moving. That in addition and in order to offer further inducement to the mills to locate in Dyersburg, the County Court passed a resolution releasing and relieving the mills from the payment of county taxes for a period of ten years, and the City of Dyersburg agreed to exempt the property from all city taxes.

(e) That the parties connected with the cotton mills, referred to in subparagraph (d), subsequently formed a corporation known as the Dyersburg Cotton Products Company.

(f) That the petitioner acquired a tract of land consisting of approximately 100 acres, and in order to raise cash funds proceeded to sell undivided interests in the land on the basis of $300.00 per unit.

(g) That the purchasers of the undivided interests in the land allowed the title thereto to remain in the name of the petitioner and that said purchasers later received certificates of beneficial ownership aggregating $30,000.00, which bore interest at the rate of 6% per annum.

(h) That in order to provide for the general welfare of the employees of the Dyersburg Cotton Products Company, the petitioner agreed to construct houses on the land, hereinbefore referred to, since adequate housing facilities were not then available.

[fol. 6] (i) That in order to procure funds for the construction of the houses, the petitioner sold first mortgage 6% bonds dated February 1, 1929, having an aggregate principal amount of $75,000.00, for $67,500.00.

(j) That the Dyersburg Cotton Products Company rented the houses to its employees and that the Dyersburg Cotton Products Company paid to or for the petitioner, as rent under terms of a lease, amounts to cover bond interest and principal requirements and also interest on the certificates of beneficial ownership.

(k) That the officers of the petitioner have never received any compensation for their services.

(l) That the Dyersburg Cotton Products Company has an option to acquire the land, buildings, and improvements of the petitioner at any time upon payment of the then outstanding bonds and accrued interest and upon payment of the accrued interest and principal amount of the certificates of beneficial ownership then outstanding and any other liens then outstanding against the property of the petitioner.

(m) That in certain eventualities the petitioner has the right to sell any or all of the houses and lots in question and to apply the proceeds to the discharge of the mortgage indebtedness.

(n) That in certain eventualities it is possible (under the terms of the "Lot Pool Agreement") for the holders of the certificates of beneficial ownership to recover for their respective undivided interests in the property whatever proceeds from the sale of property remain after payment of the mortgage indebtedness.

(o) That the petitioner has never filed federal income tax returns, since it believed it was a "tax exempt" corporation.

(p) That the petitioner keeps only memorandum records and does not maintain a regular set of books or accounting records.

[fol. 7] Wherefore, the petitioner prays that this Board may hear the proceeding and find:

(a) That the petitioner is exempt from tax under provisions of Section 101 (7) or 101 (8) of the 1934 and 1936 Revenue Acts and similar provisions of Section 103 of the 1932 Act.

(b) That the aggregate deficiency (including penalties) of $14,920.59 be reversed.

(c) That if the Board determines the petitioner is not an exempt corporation, then the net income reflected by the respondent's notice of deficiency should be reduced by the allowable deductions enumerated in paragraph 4 (b) herein.

(d) That if the Board determines the petitioner is not an exempt corporation, it finds the petitioner was not "doing business" and therefore not subject to excess-profits tax.

H. A. Mihills
917 Munsey Building
Washington, D. C.
Counsel for Petitioner

[fol. 8] *State of Tennessee,*

County of Dyer, ss:

R. S. Watkins, being duly sworn, says that he is the Secretary of the Industrial Addition Association, the petitioner above-named, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that these he believes to be true.

(Signed) R. S. Watkins.

(Seal)

Subscribed and sworn to before me this 5th day of July, 1940.

(Signed) Verna Marie Lauderbach
Notary Public

(Seal)

My Commission Expires Jan. 7-1943.

[fol. 9] (Copy) Exhibit A

Treasury Department
Internal Revenue Service

Apr. 10, 1940

Office of
Internal Revenue Agent in Charge
Nashville Division

Industrial Addition Association,
Dyersburg, Tennessee.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) Dec. 31, 1932 to 1936,

inc., discloses a deficiency of $10,706.77, and that the determination of your excess-profits tax liability for the year(s) mentioned discloses a deficiency of $4,213.82, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Nashville, Tenn., for the attention of IT:90D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

Guy T. Helvering,
Commissioner,

By (Signed) N. F. Richardson
Internal Revenue Agent

Enclosures:

Statement
Form of waiver 870
HED:ALR

STATEMENT

IT:90D

Industrial Addition Association,
Dyersburg, Tennessee.

Tax Liability for the Taxable Years Ended
December 31, 1932 to 1936, inclusive

Income Tax

	Liability	Assessed	Deficiency	Penalty
1932	$ 640.74	None	$ 640.74	$ 160.19
1933	177.05	None	177.05	44.26
1934	2,327.44	None	2,327.44	581.86
1935	4,339.50	None	4,339.50	1,084.88
1936	1,080.68	None	1,080.68	270.17
Total	$8,565.41	None	$8,565.41	$2,141.36

Excess-profits Tax

1933	$ 64.38	None	$ 64.38	$ 16.10
1934	846.34	None	846.34	211.59
1935	1,578.00	None	1,578.00	394.50
1936	882.33	None	882.33	220.58
Total	$3,371.05	None	$3,371.05	$ 842.77

This determination of your income tax and excess-profits tax liability has been made upon the basis of information on file in the Bureau, and after giving careful consideration to your protest dated March 11, 1938, and to the statements made during the conferences held on August 25, 1938 and July 18, 1939.

It is held that you are not exempt from taxation under the provisions of Section 101 of the Revenue Act of 1936 and the corresponding provisions of prior Revenue Acts.

Inasmuch as you failed to file income tax returns within the time prescribed by law, 25 per centum of the tax has been added thereto in accordance with the provisions of Section 291 of the Revenue Acts of 1932, 1934, and 1936.

Industrial Addition Association — Statement 10

Year 1932
COMPUTATION OF NET INCOME

Since no return was filed, taxable net income has been determined to be as follows:

Income			
Rent received for mill village			$12,267.64
Deductions			
Interest on first mortgage bonds		$ 4,500.00	
Depreciation on houses comprising the mill village:			
Basis for depreciation	$77,692.90		
Estimated useful life 25 years			
1/25th of $77,692.90		3,107.72	7,607.72
Taxable net income			$ 4,659.92

COMPUTATION OF TAX

Income Tax:		
Taxable net income	$ 4,659.92	
Tax on income of $4,659.92 at 13-3/4%		$ 640.74
Income tax assessed:		
Original, Account No. No return filed		None
Deficiency of income tax		$ 640.74
Penalty, 25% of $640.74		$ 160.19

Year 1933
COMPUTATION OF NET INCOME

Since no return was filed, taxable net income has been determined to be as follows:

Income			
Rent received for mill village			$8,962.35
Deductions			
Interest on first mortgage bonds		$ 4,567.00	
Depreciation on houses comprising the mill village:			
Basis for depreciation	$77,692.90		
Estimated useful life	25 years		
1/25th of $77,692.90		3,107.72	7,674.72
Taxable net income			$1,287.63

Industrial Addition Association — Statement

COMPUTATION OF TAX

Excess-profits Tax:

Taxable net income	$1,287.63	
Less: 10% of $ No value of capital stock as declared in your capital stock tax return for the year ended June 30, 1933 - no return filed	None	
Net income for tax computation	$1,287.63	
Tax on net income of $1,287.63 at 5%		$ 64.38
Excess-profits tax assessed: Original, Account No. No return filed		None
Deficiency of excess-profits tax		$ 64.38
Penalty, 25% of $64.38		$ 16.10

Income Tax:

Taxable net income	$1,287.63	
Tax on income of $1,287.63 at 13-3/4%		$ 177.05
Income tax assessed: Original, Account No. No return filed		None
Deficiency of income tax		$ 177.05
Penalty, 25% of $177.05		$ 44.26

Year 1934
COMPUTATION OF NET INCOME

Since no return was filed, taxable net income has been determined to be as follows:

Income			
Rent received for mill village			$24,238.91
Deductions:			
Interest on first mortgage bonds		$4,204.32	
Depreciation on houses comprising the mill village:			
Basis for depreciation	$77,692.90		
Estimated useful life	25 years		
1/25th of $77,692.90		3,107.72	7,312.04
Taxable net income			$16,926.87

Industrial Addition Association — Statement

COMPUTATION OF TAX

Excess-profits Tax:		
Taxable net income	$16,926.87	
Less: 10% of $ No value of capital stock as declared in your capital stock tax return for the year ended June 30, 1934 - no return filed	None	
Net income for tax computation	$16,926.87	
Tax on net income of $16,926.87 at 5%		$ 846.34
Excess-profits tax assessed: Original, Account No. - no return filed		None
Deficiency of excess-profits tax		$ 846.34
Penalty, 25% of $846.34		211.59
Income Tax:		
Taxable net income	$16,926.87	
Tax on income of $16,926.87 at 13-3/4%		$ 2,327.44
Income tax assessed: Original, Account No. no return filed		None
Deficiency of income tax		$ 2,327.44
Penalty, 25% of $2,327.44		581.86

Year 1935
COMPUTATION OF NET INCOME

Since no return was filed, taxable net income has been determined to be as follows:

Income			
Rent received for mill village		$12,385.35	
Capital gain realized from the sale of 140 lots, comprising approximately 24.11 acres -			
Satisfaction of notes payable to banks received in payment for the lots	$31,057.28		
Basis of lots sold	5,114.94		
Capital gain		25,942.34	$38,327.69

Industrial Addition Association — Statement

Amt. brought fwd.		$38,327.69
Deductions		
Interest on first mortgage bonds	$ 3,660.00	
Depreciation on houses comprising the mill village (as computed for previous years)	3,107.72	6,767.72
Taxable net income		$31,559.97

COMPUTATION OF TAX

Excess-profits Tax:		
Taxable net income	$31,559.97	
Less: 10% of $ No value of capital stock as declared in your capital stock tax return for the year ended June 30, 1935 - no return filed	None	
Net income for tax computation	$31,559.97	
Tax on net income of $31,559.97 at 5%		$ 1,578.00
Excess-profits tax assessed: Original, Account No. - no return filed		None
Deficiency of excess-profits tax		$ 1,578.00
Penalty, 25% of $1,578.00		$ 394.50
Income Tax:		
Taxable net income	$31,559.97	
Tax on income of $31,559.97 at 13-3/4%		$ 4,339.50
Income tax assessed: Original, Account No. - no return filed		None
Deficiency of income tax		$ 4,339.50
Penalty, 25% of $4,339.50		$ 1,084.88

Industrial Addition Association — Statement

Year 1936
COMPUTATION OF NET INCOME

Since no return was filed, taxable net income has been determined to be as follows:

Income		
Rent received for mill village		$13,475.50
Deductions		
Interest on first mortgage bonds	$3,015.00	
Depreciation on houses comprising the mill village (as computed for previous years)	3,107.72	6,122.72
Taxable net income		$ 7,352.78

COMPUTATION OF TAX

Excess-profits Tax:		
Taxable net income	$7,352.78	
Less: 10% of $ No value of capital stock as declared in your capital stock tax return for year ended June 30, 1936 - no return filed	None	
Net income subject to excess-profits tax	$7,352.78	
Total excess-profits tax on	$7,352.78 at 12%	$ 882.33
Excess-profits tax assessed: Original, Account No. no return filed		None
Deficiency of excess-profits tax		$ 882.33
Penalty, 25% of $882.33		$ 220.58
Income Tax - Normal Tax:		
Taxable net income	$7,352.78	
Normal tax net income	$7,352.78	
Tax on income over 0 to $ 2,000.00	$2,000.00 at 8%	$ 160.00
over $2,000.00 to $7,000.00	5,352.78 at 11%	588.81
Total normal tax		$ 748.81

Industrial Addition Association — Statement

Income Tax - Surtax on Undistributed Profits:

Taxable net income	$7,352.78	
Less: Normal tax	748.81	
(a) Adjusted net income	$6,603.97	
Less: Dividends paid credit	1,863.00	
(b) Undistributed net income	$4,740.97	
Total surtax on	$4,740.97 at 7%	$ 331.87
Normal tax		$ 748.81
Total income tax (normal tax and surtax)		$1,080.68
Income tax assessed (normal tax and surtax): Original, Account No: - no return filed		None
Deficiency of income tax		$1,080.68
Penalty, 25% of $1,080.68		$ 270.17

[fol. 17] Endorsed: Filed Sep 3-1940

United States Board of Tax Appeals Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Answer.

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-stated proceedings, admits, denies and qualifies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the allegations contained in paragraph (3) of the petition.

(4) Denies that errors were committed as alleged in subparagraphs (a), (b) and (c) of paragraph (4) of the petition.

(5) (a) Admits that during the year 1926, or thereabout, certain business men and other individuals of the City of Dyersburg, Tennessee, were desirous of inducing industry to locate in Dyersburg or its vicinity. Denies the remaining allegations contained in subparagraph (a) of paragraph (5) of the petition.

[fol. 18] (5) (b) Admits that the Industrial Addition Association was incorporated under the laws of Tennessee in 1926 for the purpose of accomplishing the aims set forth.

Denies the remaining allegations contained in subparagraph (b) of paragraph (5) of the petition.

(c) Denies the allegations contained in subparagraph (c) of paragraph (5) of the petition.

(d), (e), (f) and (g) Admits the allegations contained in subparagraphs (d), (e), (f) and (g) of paragraph (5) of the petition.

(h) Admits that the petitioner agreed to construct houses on the land, hereinbefore referred to, since adequate housing facilities were not then available. Denies the remaining allegations contained in subparagraph (h) of paragraph (5) of the petition.

(i) Denies the allegations contained in subparagraph (i) of paragraph (5) of the petition.

(j) Admits the allegations contained in subparagraph (j) of paragraph (5) of the petition.

(k) Denies the allegations contained in subparagraph (k) of paragraph (5) of the petition.

(l), (m), and (n) Admits the allegations contained in subparagraphs (l), (m) and (n) of paragraph (5) of the petition.

(o) Admits that the petitioner has never filed federal income tax returns. Denies the remaining allegations contained in subparagraph (o) of paragraph (5) of the petition.

[fol. 19] (5)(p) Denies the allegations contained in subparagraph (p) of paragraph (5) of the petition.

Denies generally and specifically each and every material allegation not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be affirmed.

(Signed) J. P. Wenchel,

FMT

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Frank M. Thompson, Jr.,
Division Counsel,
Special Attorney,
Bureau of Internal Revenue.

FMT:AAS 8-27-40.

[fol. 20] The Tax Court of the United States Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753. Promulgated December 30, 1942.

1. Petitioner, a corporation which in its inception was not organized for profit, constructed approximately 100 houses and leased them to a milling company at a rental sufficient to amortize petitioner's indebtedness and to pay 6 percent per annum on its outstanding certificates of beneficial ownership. *Held*, petitioner is not exempt from tax under section 101 (7) or (8) of the 1936 Act and corresponding sections of the 1934 and 1932 Act; *held, further*, petitioner was not engaged in carrying on or doing business during the years 1933 to 1936, inclusive.

2. Payments to certificate holders designated interest *held* not deductible as interest paid, inasmuch as the certificates were not evidences of indebtedness.

H. A. Mihills, C. P. A., for the petitioner.

Frank M. Thompson, Jr., Esq., for the respondent.

The Commissioner determined deficiencies in income tax and excess profits tax, together with penalties for failure to file returns within the time prescribed by law, as follows:

	Income tax		Excess profits tax	
Year	Deficiency	Penalty	Deficiency	Penalty
1932	$640.74	$160.19		
1933	177.05	44.26	$64.38	$16.10
1934	2,327.44	581.86	846.34	211.59
1935	4,339.50	1,084.88	1,578.00	394.50
1936	1,080.68	270.17	882.33	220.58

The principal issue is whether petitioner is exempt from taxation under section 103 (7) or (8) of the Revenue Act of 1932 and section 101 (7) or (8) of the Revenue Acts of 1934 and 1936. If petitioner is not exempt, the alternative issues are (1) whether it was carrying on or doing business during the years 1933 to 1936, inclusive, and (2) whether amounts paid as interest upon certificates of beneficial ownership are deductible as interest paid, or in reality constituted dividends.

[fol. 21] **Findings of Fact.**

Petitioner is a corporation, with its principal office in Dyersburg, Tennessee. No returns for the periods here involved were filed.

During the year 1926 certain business men and other individuals in the city of Dyersburg were desirous of inducing industry to locate in Dyersburg or its vicinity in order to relieve an unemployment problem which then existed. The Civic Club of Dyersburg was interested in the project, and a committee of five individuals conducted preliminary negotiations with certain cotton milling companies in Michigan and New York. After a tentative agreement was reached, and to accomplish the purpose of procuring industry to locate in Dyersburg, petitioner was incorporated under the laws of Tennessee on November 27, 1926. The charter provided that the general welfare of society, not individual profit, was the object for which the charter was granted, and the members were not stockholders in the legal sense of the term and no dividends or profits should be divided among the members. Petitioner was incorporated, as stated in the charter, "for the purpose of encouraging, inducing, and contracting with industrial institutions to locate in the Town of Dyersburg, or the immediate vicinity thereof; to raise the necessary funds by such means as they may deem wise, and to disburse said funds so raised by gift, purchase of stock or loan to any such industry, and for the general welfare of the community."

The general powers of the corporation were to sue and be sued, use a common seal, establish bylaws, acquire and sell personal property and real estate necessary for the transaction of its business, and appoint subordinate officers and agents. The board of directors was granted the power to elect other members, who, upon acceptance of

membership, were to become corporators equal with the original corporators; and the board of directors was granted the further power to determine the amount of money required to be paid for membership, whether to be paid in a lump sum or annually, and failure to pay such amount would justify expulsion of a defaulting member in the discretion of the board of directors. In all elections each member was to be entitled to one vote. The corporation could be voluntarily dissolved by the members by a conveyance of its assets to another corporation not organized for individual profit; and the corporation was subject to dissolution at the instance of the state upon violation of any provision of its charter.

On March 22, 1928, a contract was executed between petitioner and cotton milling companies whose plants were then located in Michigan and New York, whereby the latter agreed to locate their plants in Dyersburg on a site to be donated by petitioner, and petitioner agreed to pay to the companies the amount of $100,000 to defray expenses involved in moving. In addition, the milling [fol. 22] companies received assurances that their plants would be relieved of city and county taxes for a period of 10 years. Petitioner's expenses in negotiating the contract, including railroad fares to Michigan and New York, were borne by the individuals who were acting in behalf of petitioner. Performance of the contract on the part of petitioner was guaranteed by 47 individuals of Dyersburg.

The parties connected with the cotton mills subsequently formed a corporation known as the Dyersburg Cotton Products Co. Petitioner acquired a tract of land

of approximately 100 acres, and in order to raise cash funds proceeded to sell undivided interests in the land on the basis of $300 per unit. The purchasers of the undivided interests in the land allowed title to remain in the name of petitioner. Many of the subscribers considered that they were making donations to a civic cause. On April 13, 1928, certain of the purchasers entered into a "lot-pool agreement" which recited that they had purchased lots in the addition of the Industrial Addition Association; and they agreed to pool the number of lots set opposite their names and to "pay for the number of lots set opposite our names at the rate of $300 per lot and after a certain portion of land is set apart so as to divide 100 lots, said land so set apart not to exceed 25 acres, we hereby agree to permit the title to said lots to remain in the Industrial Addition Association and will permit the said association or corporation to borrow money on the strength of said title * * * and execute a mortgage upon said lots to secure the necessary funds with which to erect 100 houses * * *." The agreement also provided that the houses so built by petitioner would be rented to the employees of the milling company or other suitable persons, and that the rents collected would be used to discharge the mortgage indebtedness. It was further agreed that petitioner's officers would have the right to sell any or all of the houses and lots and to use the proceeds to discharge the mortgage indebtedness and to divide any excess proceeds arising from such sale "among the undersigned certificate holders in proportion to the number of certificates held by each of them."

On September 5, 1928, an agreement supplemental to that of March 22, 1928, between petitioner and the milling company was executed whereby petitioner agreed to construct upon lots belonging to it or to its members adjacent to the mill site 100 dwelling houses and to rent all of the houses to the company. The milling company agreed to rent all of the houses from petitioner at a rental charge which would yield to petitioner a net return of 6 percent per annum on its investment, and it further agreed to maintain the houses in a reasonable state of repair. The contract granted the milling company the option to purchase the houses at any time within 10 years [fol. 23] at actual cost of construction plus the value of each lot.

In order to procure funds for the construction of the houses petitioner sold first mortgage 6 percent bonds dated February 1, 1929, having an aggregate principal of $75,000, for $67,500. On February 1, 1929, petitioner leased the lots which were the subject of the "lot-pool agreement" to the Dyersburg Cotton Products Co., and obligated itself in the lease to erect on the leased premises 95 dwelling houses and to deliver possession thereof to the lessee. As rent, the lessee agreed to pay "the lessor, or its assigns, or as otherwise directed in said mortgage" amounts sufficient to discharge the interest and principal of the $75,000 mortgage, and, in addition, to pay to the holders of petitioner's certificates of beneficial ownership the sum of 6 percent per annum on the face value of such certificates. The lessee further agreed to pay all assessments, taxes, and insurance. The lease was for a period

of 13 years from February 1, 1929, to January 31, 1942, and the lessee was granted the option to renew for a period of five years, that is, to January 31, 1947, upon the same terms and conditions, except that the rental during the renewal period was to be an amount to net petitioner or the holders of its ownership certificates then outstanding 6 percent per annum on the value of the leased land, exclusive of buildings and improvements. For the purposes of the lease the value of the leased premises, exclusive of buildings and improvements, was determined and agreed to be $300 per lot. The lessee was also granted the option to purchase the leased premises, together with the buildings and improvements thereon, at any time during the term of the lease or renewal thereof by the payment or assumption of any balance remaining due on the mortgage, principal or interest, plus the payment of the sum of $300 per lot to each of petitioner's certificate holders and any accumulated interest thereon, and the payment of any remaining balance of an amount of $9,650 due by the lessee to petitioner.

The interest of a subscriber to the lot-pool agreement was represented by a certificate issued by petitioner upon the payment of $300 per lot. The back of the certificate carried the words "Certificate for Shares of the Capital Stock of Industrial Addition Association." It certified that the holder was the beneficial owner of a $300 undivided interest in certain lots (which were the lots leased to the Dyersburg Cotton Products Co., subject, however, to the terms and conditions of the mortgage in the amount of $75,000 and subject also to the terms and provisions of

the lease to the Dyersburg Cotton Products Co.) The certificate provided that so long as it remained outstanding the holder was entitled, by virtue of said lease, to demand and receive from the Dyersburg Cotton Products Co. simple interest at the rate of 6 percent per annum upon the principal amount of the certificate from the [fol. 24] date thereof to the date of the termination of the lease or any renewal thereof, unless the lease was sooner terminated under the provisions thereof or by mutual consent. The certificate also provided that the holder would, upon demand, surrender the same to petitioner for cancellation upon payment to the holder of the principal amount of the certificate plus interest then accrued and unpaid, whereupon the beneficial interest of the holder in the lots should cease. The certificates were transferable on the books of petitioner.

Such certificates were issued by petitioner in the aggregate amount of $30,000 under date of July 1, 1929. The following amounts were paid in the respective years 1932 to 1936, inclusive, in accordance with the provisions of the certificates, described therein as simple interest at the rate of 6 percent per annum: $1,125, $2,061, $3,537, $1,827, and $1,863.

In accordance with the terms of the lease the Dyersburg Cotton Products Co. rented the houses to its employees and paid to or for petitioner amounts to cover both interest and principal upon the morfgage and also interest on the certificates of beneficial ownership. All of these payments were made directly by the lessee to

28, 1942, the lessee exercised its option to renew the lease for the period of five additional years. The mortgage had been entirely paid by that time; so that the only rental to be paid by the lessee was $1,800 per year, representing 6 percent interest on the outstanding $30,000 face value of certificates.

No compensation or payment for services of any kind was ever made by petitioner. Its officers and directors and the lawyer who prepared the legal papers for petitioner all donated their services. No financial statments have ever been prepared by petitioner. There were no meetings of any kind held by petitioner after 1929, inasmuch as the purpose of its organization had been accomplished, and no permanent books of record were kept except a minute book containing the subscriptions to petitioner. No corporate business was transacted during the taxable years. Petitioner was not carrying on or doing business during the years 1933 through 1936.

The parties have stipulated that petitioner is entitled to the following deductions which were not allowed in the notice of deficiency: interest paid, $165.71 and $102.72 for the years 1932 and 1933, respectively; taxes paid, $211.40 for 1934; and amortization of bond discount, the amounts of $882.35, $801.37, $713.24, $625, and $536.76, respectively, for the years 1932 to 1936, inclusive.

[fol. 25] **Opinion.**

Arundell, Judge: Petitioner claims to be exempt from tax under subsection (7) or (8) of section 101 of the Reve-

and 1934 Acts. The two subsections, which were reenacted without change in each of the three acts, are set forth below.[1] Petitioner asserts that its position is generally supported by either or both of these subsections; though it does not state with clarity which provision governs the particular facts presented here.

Two factors must appear as a prerequisite to exemption under either paragraph. One of these is common to both, namely, that the corporation must not have been organized for profit. To fall within subdivision (7) it must further appear that no part of the net earnings inures to the benefit of any private shareholder or individual; and subdivision (8) requires that the civic organization be operated exclusively for the promotion of social welfare.

We think it clear in the instant case that in its inception petitioner was not organized for profit, but rather was a civic enterprise designed to meet a community problem. Its purpose was to induce industry to locate in Dyersburg

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[1] SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this title—

* * * * * * * * *

(7) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * * * * * * *

and there was no intent to conduct a business for the benefit of private individuals. To secure the necessary funds to accomplish that purpose, instead of merely asking for donations, it acquired a large tract of land and proceeded to sell undivided interests therein.

Incidental to the main plan there was a need to furnish sufficient dwellings to house the employees of the milling company. For this purpose certain of the individuals who had purchased undivided interests in the land pooled their interest and, by agreement among themselves and with petitioner, authorized petitioner to construct houses on lots represented by such interests, which were leased to the milling company and by it to the employees. In return, these individuals received certificates from petitioner entitling them to 6 percent on their investment. The certificates, if called, were redeemable at face value, and the lease granted the lessee the option to purchase the [fol. 26] houses and lots by discharging the mortgage incurred to erect the houses and by paying the certificate holders the face amount of their certificates plus accrued interest. The lot-pool agreement specified that petitioners could sell the houses and lots, in which event the proceeds of sale in excess of the amount of the mortgage were to be divided among the certificate holders.

When petitioner thus subdivided some of its property and erected houses thereon with a view to renting them, it projected itself into a business of a kind that is ordinarily carried on privately for profit. It entered a competitive field. In these circumstances, to enjoy the advantage of tax exemption it must demonstrate that it falls strictly

within one of the favored classifications. *Produce Exchange Stock Clearing Association* v. *Helvering*, 71 Fed. (2d) 142, 143; *Medical Diagnostic Association*, 42 B. T. A. 610, 617; *Fort Worth Grain & Cotton Exchange*, 27 B. T. A. 983; *Producers' Creamery Co.* v. *United States*, 55 Fed. (2d) 104.

We think it has failed to do so. The premises were rented at a sum sufficient to discharge petitioner's indebtedness and to return to the certificate holders 6 percent per annum on their investment. The 6 percent payments concededly represented a part of petitioner's earnings, and obviously inured to the benefit of private shareholders or individuals. Exemption under subsection (7) must consequently be denied.

Nor do we think it can be said that a company is operated exclusively for the promotion of social welfare where, however laudable its aims, a portion of its profits is paid to investors and there is, in addition, a possibility of a distribution to them of the net proceeds from the sale of its assets. Petitioner appears to rest its argument upon the proposition that exemption is allowable if the certificate holders were entitled only to a return of their investment plus interest in the meantime. It states that the holders "were willing to risk their own money with the possible chance of receiving their principal back with interest, and no more." But we think the exemption would have to be denied even if the certificate holders could receive only a return of their investment plus interest. We denied exemption in *Amalgamated Housing Corporation*, 37 B. T. A. 817; affd. *per curiam*, 108 Fed. (2d) 1010, to

limited dividend housing corporations the stockholders of which could not sell their stock for more than par plus accrued dividends and, upon dissolution, could receive no more than par plus accrued dividends, the balance to be paid to the state. Dividends in that case could not exceed 6 percent per annum. In declining to follow the opinion of the Seventh Circuit in *Garden Homes Co. v. Commissioner*, 64 Fed. (2d) 593, upon which the present petitioner relies, we said:

[fol. 27] * * * The provision for 6 per cent on the stock was deliberately designed to encourage the use of private capital * * * The corporations during the taxable years * * * were operated in such a way as to permit the payment of dividends on the preferred shares. * * * Each was organized in part for profit, even though the profit was limited, and neither was operated exclusively for the promotion of social welfare.

We see no merit in petitioner's contention that the certificate holders were merely creditors who had no right to vote or take part in the mangement of its affairs. Whether they were creditors or investors depends upon whether the real transaction, as intended by the parties, was an investment in the corporation or a loan to it. *Proctor Shop, Inc.*, 30 B. T. A. 721, 725; affd., 82 Fed. (2d) 792. There can be no question but that the certificates involved here did not evidence debts. Neither they nor the lot-pool agreement contained any promise on petitioner's part to repay the principal amount of $300. Even the right to receive the so-called interest was to cease upon termination of the lease, although the certificates might then remain

outstanding. "There is, thus, an entire absence here of the most significant, if not the essential feature of a debtor and creditor as opposed to a stockholder relationship, the existence of a fixed maturity for the principal sum with the right to force payment of the sum as a debt in the event of default." *United States* v. *South Georgia Railway Co.*, 107 Fed. (2d) 3, 5; *Parisian, Inc.* v. *Commissioner*, ___ Fed. (2d) ___ (Nov. 10, 1942). We think it clear that petitioner's subscribers, whether they pooled their interests or not, constituted its members; but even if the certificates carried no voting rights, that fact would not be decisive. "Preferred Stock is frequently issued without such rights." *Ticker Publishing Co.*, 46 B. T. A. 399, 411. Some of the subscribers testified that they regarded their payments as donations, and petitioner states on brief that while interest has been paid, "little if anything of the $300 subscription [was] ever expected to be returned." Thus, both the form and the intent negative the creation of a debt.

Petitioner places much reliance upon the fact that it was organized under provisions of the Tennessee Code relating to nonprofit corporations and that its charter prohibited the distribution of dividends. It is well settled, however, that these factors are not determinative. We said in *Apartment Operators Association*, 46 B. T. A. 229, 233, 234:

* * * The fact that the corporation was organized under the state laws relating to nonprofit corporations and the officers had no intention to conduct its operations at a profit is less important than its actual operations. * * *

We conclude that respondent correctly determined that petitioner is not entitled to the exemption it seeks. [fol. 28] On the second issue, however, we are satisfied that during the years 1933 to 1936, inclusive, petitioner was not carrying on or doing business and therefore is not subject to the excess profits tax. The record establishes that petitioner's primary aim had been accomplished by the end of 1929. Industry had been located in Dyersburg; petitioner had rented the houses and lots for a period of 13 and possibly 18 years; the lessee had assumed the burdens of management and repair of the premises, including the payment of taxes and insurance; and the rental did not even pass through petitioner's hands, but was paid directly by the lessee to petitioner's creditor and certificate holders. No meetings of any kind were held, no records were kept, no compensation for services was paid, and, so far as appears, no corporate business of any kind was transacted. On this issue petitioner is sustained. *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295; *Kingkade Hotel Co.* v. *Jones*, 30 Fed. Supp. 508; dismissed on stipulation, 108 Fed. (2d) 1015; *Sears* v. *Hassett*, 111 Fed. (2d) 961; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28.

The remaining issue is whether the 6 percent payments to the holders of certificates may be deducted as interest paid. We have already stated our conclusion that the certificates were not evidences of indebtedness. The payments, therefore, may not be deducted as interest paid upon indebtedness. *United States* v. *South Georgia Railway Co.*

Since petitioner failed to file returns, and there is no showing of reasonable cause for such failure, it is liable for the penalty imposed by section 291 of the applicable revenue acts. See *Furniture Finance Corporation*, 46 B. T. A. 240.

Decision will be entered under Rule 50.

[fol. 29]. Enter: Entered Mar 12 1943

The Tax Court of the United States Washington Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Decision.

Pursuant to the Opinion of the Court promulgated December 30, 1942, the respondent herein, on February 5, 1943, filed a recomputation for entry of decision. Hearing was had thereon on March 10, 1943, at which time the recomputation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That for the calendar years 1932, 1933, 1934, 1935, and 1936, there are deficiencies in income tax and penalties, and that there are no deficiencies in excess profits tax, as follows:

Year	Deficiency in income tax	Penalty	Deficiency in excess profits tax
1932	$ 496.63	$ 124.16	—
1933	52.73	13.18	None

1935	4,253.56	1,064.39	None
1936	988.19	247.05	None

(Signed) C. R. Arundell

Judge

[fol. 31] Endorsed: Filed Jun 11 1943

The Tax Court of the United States Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Petition for Review.

To the Honorable United States Circuit Court of Appeals for the Sixth Circuit:

Industrial Addition Association, your petitioner, by its attorneys, H. A. Mihills and F. A. Berry, respectfully avers as follows:

This is a proceeding for review by the United States Circuit Court of Appeals for the Sixth Circuit of a decision of The Tax Court of the United States, entered on March 12, 1943, finding deficiencies in income tax and penalty against your petitioner for the calendar years 1932, 1933, 1934, 1935 and 1936 in the following amounts:

Year	Income Tax	Penalty
1932	$ 496.63	$ 124.16
1933	52.73	13.18
1934	2,200.31	550.08
1935	4,253.56	1,064.39
1936	988.19	247.05

Your petitioner is a corporation with principal office at Dyersburg, Tenn. No returns for the periods here involved were filed. Your petitioner is located within the [fol. 32] jurisdiction of the Circuit Court of Appeals for the Sixth Circuit.

Wherefore, your petitioner prays as follows:

1. That a transcript of the record in this cause be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Sixth Circuit and transmitted to the Clerk of said Court for filing;

2. That such other appropriate action be taken to the end that the action of The Tax Court of the United States may be reviewed and corrected by the United States Circuit Court of Appeals for the Sixth Circuit;

3. That the United States Circuit Court of Appeals for the Sixth Circuit Review the action of The Tax Court of the United States in this cause and the decision of said Court entered herein;

4. That the United States Circuit Court of Appeals for the Sixth Circuit direct the entry of a decision by The Tax Court of the United States in favor of your petitioner, determining that your petitioner is exempt as a civic or business leagu and was not required to file income tax returns for the years 1932, 1933, 1934, 1935 and 1936, and that there was no deficiency in income tax or penalty due from your petitioner for said years; and

5. That such other and further relief be granted as to the United States Circuit Court of Appeals for the Sixth [fol. 33] Circuit appears proper in the premises.

H. A. Mihills,
917 Munsey Bldg.,
Washington, D. C.

F. A. Berry,
1000 American Trust Bldg.,
Nashville, Tenn.
Counsel for Petitioner

[fol. 34] Endorsed: Filed Jun 11 1943

The Tax Court of the United States Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Statement of Points on Which Petitioner Intends to Rely on Review.

Petitioner intends to rely, in the review of the above-entitled proceeding, upon the following points:

1. The provisions of petitioner's charter expressly show that the Association was organized as a non-profit organization and that it qualifies as a civic league, acting merely as trustee or agent for a group of citizens of Dyersburg, Tenn., in promoting the general welfare of the community.

2. Petitioner is empowered by its charter to purchase and hold or receive by gift, bequest or devise, real estate necessary for the transaction of the corporate business and sell the same.

3. Petitioner had no authorized or outstanding capital stock.

4. The Certificates of Beneficial Ownership issued by petitioner were in no sense capital stock but were evidence of indebtedness for land deeded to petitioner, providing for [fol. 35] the payment of a legal rate of interest and repayment of principal amount.

5. The income from the lease or sale of the assets of petitioner was definitely fixed in amount sufficient to and not to exceed the aggregate amount of the indebtedness of petitioner.

6. All rights, if any, of the subscribers to recover any profit, were surrendered, under the terms of the contract with Dyersburg Cotton Products Company, and no division could be made, except after an involuntary sale to satisfy lien holders, which would occur after default, and such distribution could not exceed the amount of original investment with interest.

7. Petitioner did not or could not have any profits for distribution to members, Tennessee law prohibiting corporations of this character from entering commercial business and distributing profits.

8. That part of the contract with Dyersburg Cotton Products Company which refers to division, is simply a remedy in case of default, and even if the proceeds of sale were sufficient to declare a division of profits, such would then be prohibited by law.

9. Petitioner could not issue shares of stock, and if it intended to do so and did issue shares of stock, the same were void and entitled the shareholder to absolutely nothing, any such distribution being in violation of law.

[fol. 36] 10. The amounts paid by petitioner as interest upon Certificates of Beneficial Ownership are deductible as interest paid, and could not have constituted dividends, as found by The Tax Court of the United States, since there is a statutory prohibition in Tennessee of a distribution of earnings, or even of capital assets among any "members" or "participants" of any character whatever.

11. In the event of a sale by petitioner of all of the houses, and payment of the mortgage, it could not divide any excess proceeds arising from such sale among certificate holders, as held by The Tax Court of the United States, since it would be contrary to the established facts of the case, and in violation of the laws of the State of Tennessee.

12. In the event of voluntary action being taken by petitioner's members to dissolve it, the only distribution of assets permissible to be made would be by conveyance to another like corporation or escheat to the State.

13. Petitioner was exempt as a civic or business league and was not required to file income tax returns, and no penalty should have been imposed for failure to do so.

H. A. Mihills,
917 Munsey Bldg.,
Washington, D. C.

F. A. Berry,
1000 American Trust Bldg.,
Nashville, Tenn.

Counsel for Petitioner.

[fol. 37] Service of a copy of the foregoing is hereby acknowledged this 11th day of June, 1943.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

* * * * * * * * *

[fol. 39] Endorsed: Filed Apr 22 1942

United States Board of Tax Appeals Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys of record that, for the purpose of this proceeding only, the following facts shall be taken as true and that the Exhibits referred to herein and annexed hereto are hereby made a part of this stipulation and the facts therein stated shall be taken as true; and,

It is further stipulated and agreed that this stipulation shall be without prejudice to the right of either party to introduce further proof deemed material and pertinent and not in conflict with the facts here stipulated.

1. The petitioner is a corporation with principal office at Dyersburg, Tennessee. No returns for the periods here involved were filed.

2. The taxes in controversy are income taxes for the calendar years 1932 to 1936, inclusive; excess-profits taxes for the calendar years 1933 to 1936, inclusive; and penalties

proposed for the calendar years 1932 to 1936, inclusive, aggregating $14,920.59, said deficiencies having been deter-
[fol. 40] mined by the Commissioner and notice thereof having been mailed to the petitioner on or about April 16, 1940.

3. That during the year 1926, or thereabout, certain business men and other individuals of the City of Dyersburg, Tennessee, were desirous of inducing industry to locate in Dyersburg or its vicinity.

4. That the Industrial Addition Association was incorporated under the laws of the State of Tennessee in 1926 for the purpose of accomplishing the aims above set forth.

5. A copy of the charter of petitioner is attached hereto, marked Exhibit A, and made a part hereof.

6. That in March, 1928, a contract was entered into whereby certain cotton mills then located in Michigan and New York agreed to move their operations to Dyersburg, and the petitioner agreed to donate a tract of land for use as a mill site and also agreed to donate cash funds amounting to $100,000.00 to defray expenses involved in moving. That in addition and in order to offer further inducement to the mills to locate in Dyersburg, the County Court passed a resolution releasing and relieving the mills from the payment of county taxes for a period of ten years, and the City of Dyersburg agreed to exempt the property from all city taxes.

[fol. 41] 7. That the parties connected with the cotton mills, referred to in paragraph (6), subsequently formed

a corporation known as the Dyersb[illegible]g Cotton Products Company.

8. That the petitioner acquired a tract of land consisting of approximately 100 acres, and in order to raise cash funds proceeded to sell undivided interests in the land on the basis of $300.00 per unit.

9. That the purchasers of the undivided interests in the land allowed the title thereto to remain in the name of the petitioner and that said purchasers later received certificates of beneficial ownership aggregating $30,000.00, which bore interest at the rate of 6 per cent per annum. A copy of said certificate is attached hereto, marked Exhibit "B", and made a part hereof.

10. The petitioner agreed to construct houses on the land, hereinbefore referred to, since adequate housing facilities were not then available. A copy of the agreement, dated March 22, 1928, is attached hereto, marked Exhibit "C", and a copy of supplemental agreement, dated September 5, 1928, is attached hereto, marked Exhibit "D", and both made a part hereof.

11. That in order to procure funds for the construction of the houses, the petitioner sold first mortgage 6 per cent bonds dated February 1, 1929, having an aggregate principal amount of $75,000.00, for $67,500.00.

12. That the Dyersburg Cotton Products Company rented the houses to its employees and that the Dyersburg Cotton Products Company paid to or for the petitioner, as rent under terms of a lease, amounts to cover bond inter-

est and principal requirements and also interest on the certificates of beneficial ownership.

[fol. 42] 13. That the Dyersburg Cotton Products Company has an option to acquire the land, buildings, and improvements of the petitioner at any time upon payment of the then outstanding bonds and accrued interest and upon payment of the accrued interest and principal amount of the certificates of beneficial ownership then outstanding and any other liens then outstanding against the property of the petitioner.

14. That in certain eventualities the petitioner has the right to sell any or all of the houses and lots in question and to apply the proceeds to the discharge of the mortgage indebtedness.

15. That in certain eventualities it is possible (under the terms of the "Lot Pool Agreement") for the holders of the certificates of beneficial ownership to recover for their respective undivided interests in the property whatever proceeds from the sale of property remain after payment of the mortgage indebtedness, to the extent permitted by law. A copy of the Lot Pool Agreement is attached hereto, marked Exhibit "E", and made a part hereof.

16. That interest was paid on money borrowed (other than bond interest) amounting to $165.71 and $102.78, respectively, for the years 1932 and 1933.

17. That state and county taxes were paid in 1934 amounting to $211.40.

18. The following amounts were paid in accordance with the provisions of the certificates of beneficial ownership (Exhibit "B"), described therein as "simple interest at the rate of six percent per annum:"

1932	$1,125.00
1933	2,061.00
1934	3,537.00
1935	1,827.00
1936	1,863.00

[fol. 43] 19. That the proportionate amount of bond discount representing the difference between the principal amount of $75,000.00 and the proceeds of $67,500.00 for the First Mortgage 6% Bonds sold by petitioner, dated February 1, 1929, was as follows:

1932	$882.35
1933	801.47
1934	713.24
1935	625.00
1936	536.76

H. A. Mihills,
Counsel for Petitioner.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

[fol. 44] **Exhibit "A."**

State of Tennessee

CHARTER OF INCORPORATION

State of Tennessee
To—Charter
Industrial Addition Assn.
Recorded November 23, 1926
At 11 o'clock A. N.
Geo. W. Lambert, R. D. C.

Be It Known that John N. Parker, John M. Tarrant, N. W. Calcutt, Bose Pillow, S. W. Bliven, R. S. Watkins, O. Z. Crumpler and J. C. Doyle are hereby constituted a body politic, by the name and style of The Industrial Addition Association, for the purpose of encouraging, inducing and contracting with Industrial Institutions to locate in the Town of D ersburg, or the immediate vicinity thereof, to raise the necessary funds by such means as they may deem wise, and to disburse said funds so raised by gift, purchaser of stock or loan to any such industry, and for the general welfare of the community.

The principal office of said corporation is First Citizens National Bank Building, Room 312, Dyersburg, Tennessee.

The general powers of said corporation shall be to sue and be sued by the corporate name; to have and use a common seal, which it may alter at pleasure; if no common seal, then the signature of the name of the corporation by any duly authorized officer shall be legal and binding; to purchase and hold or receive by gift, bequest or devise, in addition to the personal property owned by said corporation, real estate necessary for the transaction of

the corporate business, and also to purchase or accept any real estate in payment or in part payment of any debt due to the corporation, and sell the same; to establish by-laws and make all rules and regulations not inconsistent with the laws and Constitution deemed expedient for the management of corporate affairs, and to appoint such subordinate officers and agents in addition to a President and Secretary or Treasurer, as the business of the corporation may require, designate the name of the office and fix the compensation of the officer.

The said five or more incorporators shall, within a convenient time after the registration of this charter in the office of the Secretary of State, elect from their number a President, Secretary and Treasurer, or the last two officers may be combined into one; said officers and the other incorporators to constitute the first Board of Directors. In all elections each member to be entitled to one vote, either in person or by proxy, and the result to be determined by a majority of the votes cast. Due notice of any election must be given by advertisement in a newspaper, personal notice to the members, or a day stated on the minutes of the Board six months preceding the election. The Board of Directors shall keep a record of all their proceedings, which shall be at all times subject to the inspection of any member. The corporation may establish branches in any other county in the State.

The Board of Directors may have the power to increase the number of Directors from seven to ten, if they deem the interest of the corporation requires such increase. And the first or subsequent Board of Directors

may have the power to elect other members, who, on acceptance of membership, shall become corporators equally with the original corporators. The Board of Directors shall have the right to determine what amount of money paid into the treasury shall be a prerequisite for membership, or, if necessary, what amount shall be thus annually paid, and failure thus to pay shall, in the discretion of the Directors, justify the expulsion of said defaulting member. The term of all officers may be fixed by the by-laws, the said term not, however, to exceed three years. All officers hold over until their successors are duly elected and qualified.

[fol. 45] The general welfare of society, not individual, profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members. The members may at any time voluntarily dissolve the corporation by a conveyance of its assets and property to any other corporation holding a charter from the State for the purpose not of individual profit, first providing for corporate debts.

A violation of any of the provisions of this charter shall subject the corporation to dissolution at the instance of the State.

This charter is subject to modification or amendment; and in case said modification or amendment is not accepted, corporate business is to cease, and the assets and property, after payment of debts, are to be conveyed, as aforesaid, to some other corporation holding a charter for purposes not connected with individual profit. Acqui-

ence in any modification thus declared shall be deter-
ned in a meeting specially called for that purpose, and
y those voting in favor of the modification shall there-
er compose the corporation.

The means, assets, income or other property of the cor-
ation shall not be employed directly or indirectly for
y other purpose whatever than to accomplish the legiti-
te objects of its creation, and by no implication shall it
ssess the power to issue notes or currency, deal in cur-
ncy, notes or coin, buy or sell products, or engage in
y kind of trading operation, nor hold any more real es-
e than is necessary for legitimate purposes.

Expulsion shall be the only remedy for the nonpay-
nt of dues by the members, and there shall be no in-
idual liability against the members for corporate debts,
t the entire corporate property shall be liable for the
ims of creditors.

We, the undersigned, apply to the State of Tennessee,
virtue of the laws of the land, for a Charter of In-
poration for the purposes and with the powers, etc.,
lared in the foregoing instrument. This 22nd day of
vember, 1926

S. Watkins	O. Z. Crumpler
N. Parker	S. W. Raven.
C. Do e	John M. Tarrant
se Pillow	N. W. Calcutt.

ite of Tennessee,

Dyer County

Personally appeared before me, L. L. Pace, Clerk of the
unty Court of said County, John M. Tarrant, John N.

Parker, N. W. Calcutt, Bose Pillow, S. W. Bliven, R. S. Watkins, O. Z. Crumpler and J. C. Doyle, the within named bargainors with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained. Witness my hand at office in Dyersburg, Tennessee, this the 23rd day of November, 1926.

(Sgd) L. L. Pace,
(Seal) Clerk

State of Tennessee,

Department of State

I, Ernest N. Haston, Secretary of State of The State of Tennessee, do hereby certify that the annexed instrument with certificates of acknowledgment and registratio. were filed in my office and recorded on the 27th day of November 1926, in Corporation Record Book 0-10, page 87.

In Testimony Whereof, I have hereunto subscribed my official signature and by order of the Governor affixed the Great Sea of the State of Tennessee at the Department in the City of Nashville, this 27th day of November A. D. 1926.

(The Great Seal of Tennessee) Ernest N. Haston,
Secretary of State.

[fol. 46] *State of Tennessee,*

Dyer County

I, Aultie Mulherin, Register of the State and County aforesaid, do hereby certify that the foregoing instrument is a true and perfect copy of a Charter from State

INCORPORATED UNDER THE LAWS OF THE STATE OF TENNESSEE

CERTIFICATE OF

INDUSTRIAL ADDITION ASSOCIATION
DYERSBURG, TENNESSEE

This Certifies that Tom W. Scott

is the beneficial owner of a Three Hundred ($300.00) Dollars undivided interest in the lots in Blocks 13 14 15 20 21 and 22 of Industrial Addition office of Dyer County Tennessee subject however to all of the terms and conditions of the mortgage indenture or deed of trust dated February 1st 1929 executed by Industrial Addition Association to A. K. Tarrett, Trustee conveying said lots in trust to secure an issue of $75,000.00 principal amount of the First Mortgage Gold Bonds of this Association of even date therewith and of record in Book VV page 431 of the Register's Offices of Dyer County Tennessee and also subject to all the terms provisions conditions and limitations of a certain contract of lease dated February 1 1929 by Industrial Addition Association to Dyersburg Cotton Products Company of record in Book 52, page 38, of the Register's Office of Dyer County, Tennessee to which reference is here made all of which the holder hereof by accepting this certificate agrees.

So long as this certificate shall remain outstanding the holder hereof is entitled by virtue of said lease contract, to demand and receive of and from said Dyersburg Cotton Products Company on January 1st and July 1st of each year, beginning January 1st, 1930, simple interest at the rate of six per cent (6%) per annum upon the principal amount of this certificate from the date hereof to the date of the termination of said lease contract, or of any extension or renewal thereof unless said lease contract is sooner terminated under the provisions thereof or by mutual consent. Demand for the payment of said installments of interest may at the option of the holder be made on said Dyersburg Cotton Products Company on the interest payment dates as the same mature or thereafter but the holder will only be entitled to receive payment of any interest installment or installments upon presentation of this certificate to said Dyersburg Cotton Products Company for the purpose of having such interest payments as made credited upon the back hereof.

The holder of this certificate agrees that he (or she) will upon demand surrender the same to Industrial Addition Association for cancellation upon payment to the holder of the principal amount hereof plus interest then accrued and unpaid whereupon the beneficial interest of the holder hereof (represented hereby) in said lots shall cease and the right of the holder hereof to the payment of unearned interest shall cease upon and from the date of the tender to the holder of the principal amount hereof plus interest accrued and unpaid, as aforesaid, whether or not said tender is accepted and this certificate surrendered for cancellation.

This certificate and all rights hereunder shall be and are transferrable on the books of Industrial Addition Association upon presentation of this certificate properly assigned.

IN WITNESS WHEREOF said Industrial Addition Association has caused this certificate to be executed in its corporate name by its President in its behalf, and its corporate seal to be hereunder affixed, attested by its Secretary, at office in Dyersburg, Tennessee, this 1st day of July, A.D., 1929.

(SEAL)

Attest: W. H. Watson
Secretary

INDUSTRIAL ADDITION ASSOCIATION

By H. W. Watson
President

Certificate for Shares

of the

Capital Stock

Industrial Addition Association

DYERSBURG, TENN.

Issued To

Dated

CREDITS FOR INTEREST			
Date	To Whom Paid	Amount	
1/7/36	Dyersburg Savings Bank	$1.45	31.00
			5.00
			18.00
			9.00
			2.00
			3.00
			6.00

FOR VALUE RECEIVED I hereby sell, ... and transfer unto ... the within Certificate ... and do hereby irrevocably constitute and appoint ... agent and attorney-in-fact to transfer the same and all rights thereunder on the books of the Industrial Addition Association, with full power of substitution in the premises.

Dated ... da... 19...

Witnessed by

[fol. 49] **Exhibit "C."**

This contract made and entered into this 22nd day of March, 1928, by and between the Industrial Addition Association, a corporation organized and existing under the laws of the State of Tennessee, party of the first part, and the Adrian Knitted Products Company of Adrian, Michigan, represented by L. J. Lewis, Jr., and the Oswego Yarn Mills, Inc., of Oswego, New York, represented by R. H. Wheeler, parties of the second part, Witnesseth:

Whereas the parties of the second part are the owners and operators of manufacturing plants wherein are spun and knitted cotton goods used for various purposes and have associated with them certain other affiliated companies, and are desirous of removing all of said machinery and equipment from their present location, bringing with them the said equipment from the said Adrian Knitted Products Company, Oswego Yarn Mills, Inc., their purchase from the Skinandow Cotton Company and a portion of the Sawquirt Knitting Company to the town of Dyersburg, and

Whereas the party of the first part, in consideration of the benefits that may accrue to the community, are anxious to induce the said parties of the second part to locate their plant or plants at this point, it is, therefore, agreed by the parties of the second part, for the considerations hereinafter set out, that they will remove their said plants and the plants of their affiliated Companies, as shown above, and locate them on the site to be deeded to the parties of the second part, or any person, firm or

corporation whom they may designate, and that, when fully moved and established, agree to employ at least seven hundred hands working in or about the plants of [fol. 50] the said parties of the second part, and will maintain an average payroll of at least Three Hundred Thousand Dollars ($300,000.00) a year, for a period of ten years from the date of their establishment, provided that houses for that number of employees are furnished in or near the town of Dyersburg. It is further understood and agreed that the parties of the second part will not enter into competition with the party of the first part or with the lot owners in said addition by the building of houses on their property unless and until it is apparent that there are not enough houses in and around the town of Dyersburg to supply the needs of their employees.

In consideration of the promises and agreements by the parties of the second part, the party of the first part agree that they will pay to the parties of the second part the sum of One Hundred Thousand Dollars ($100,000.00), which said sum is to be collected and deposited in the three banks of Dyersburg, to-wit: First Citizens National Bank, Mercantile Bank & Trust Company and Peoples Bank & Trust Company, which said banks shall hold said fund in trust for the parties of the second part, to be drawn upon by the parties of the second part, beginning August 1st, 1928, and to be used in such sums as may be deemed necessary by the parties of the second part to pay for freight, installation of machinery and such other items as may be deemed necessary by the parties

of the second part in carrying out their agreement to move the said plants.

Party of the first part further contract and agree that they will deed to the parties of the second part, or any [fol. 51] one to whom they may direct a deed to be made, forty-five acres of land out of the one hundred and seven acre tract owned by the party of first part, lying in the Eastern part of the town of Dyersburg, transferring the same by metes and bounds and such acreage as the parties of the second part may direct, with the understanding, however, that the parties of the second part will deed to the City of Dyersburg, for a park, approximately eight acres out of the forty-five acres, reserving to themselves, however, the right of ingress and egress over the said eight acre tract for switch purposes and access to their plant, conveying same by such bounds as may be agreed upon after a survey is made;

Whereas heretofore on January 2nd, 1928, the County Court of Dyer County passed a resolution in the following words and figures, to-wit:

"Whereas an effort is being made to locate in Dyer County, near the town of Dyersburg, The Adrian Knitted Products Company, manufacturing knitted goods, the location of which plant will be of great benefit to Dyer County and its population, and

Whereas there has been donated by the citizens of Dyersburg and of the County several Thousand Dollars in order to induce this concern to move this plant to Dyer County.

Therefore in order to offer further inducement to the said Company, it is hereby resolved by the County Court of Dyer County at its regular session, that in case the said Adrian Knitted Products Company shall locate its plant in Dyer County, that then and in that event the County Court of Dyer County will release and relieve the said Adrian Knitted Products Company from the payment of County Taxes for the next succeeding ten years after the plant starts operating.

This the 2nd day of January, 1928."

Agreeing to release the said Adrian Knitted Products Company from all taxes accruing to the County on twenty [fol. 52] acres, the said party of the first part agree and contract that they will have the resolution above past so amended as to include all of the forty-five acre tract hereinabove agreed to be conveyed, and provided further that the said exception shall apply to any person, partnership or corporation that may be established by the said parties of the second part, and

Whereas it was agreed by the City of Dyersburg that the factory site, consisting of twenty acres, should be exempted of all City taxes and excluded from the City of Dyersburg by Legislative act by the next Legislature, it is now contracted and agreed by the party of the first part that the City will so amend its resolutions as to exempt all of the forty-five acres herein agreed to be conveyed, and will have the said forty-five acres, or so much thereof as the parties of the second part may designate, excluded by legislative act instead of twenty acres.

Party of the first part further contract and agrees that it will cause a railroad switch to be run from the main line of the Illinois Central Railroad Company into and over the said forty-five acre tract which they will deed to the parties of the second part, so as to properly serve the needs of said party.

Industrial Addition Association
By N. W. Calcutt
President.

R. S. Watkins,
Secretary and Treasurer.

Adrian Knitted Products Company
By Ladd J. Lewis, Jr.
Oswego Yarn Mills, Inc.,
By R. H. Wheeler

[fol. 53] We, the undersigned, having read and understood the above contract executed by and between the Industrial Addition Association, and the Adrian Knitted Products Company and the Oswego Yarn Mills, Inc., do hereby contract and agree and guarantee that the Industrial Addition Association will carry out and perform its contract in full, provided however that the guarantee as to the remission of taxes will be for a period of 5 years—

R. S. Watkins	H. A. Fowlkes
K. W. Rogers	C. E. Daves
J. H. Robbins	W. G. Burks
F. W. Latta	O. Z. Crumpler
Robt. A. Burke	J. P. Baird
J. C. Rogers	Wm. S. Summers
Earl Johnson	J. N. Parker
J. U. Overall, Jr.	F. J. Harrell

J. C. Doyle	J. F. Biggs
S. W. Bliven	J. K. White
Geo. W. Lambert	E. L. Cogbill
W. N. Waggoner	Bose Pillow
S. A. Jarrell	P. S. Williams
R. Wayne Stewart	D. M. Meeks
A. H. Hugo	Thomas J. Walker
H. R. Meriwether	Walter E. Harman
J. E. Hays	W. N. Myriott
I. D. Edmonds	C. E. Burns
John H. Reed	Jno. M. Tarrant
E. W. Tatum	R. Rawles
B. F. Craddock	N. W. Calcutt
W. B. Stone	W. B. Maxey
P. A. Conyers	L. D. Hamner
H. B. Rike	

[fol. 54]

Exhibit "D."

This Agreement made and entered into this 5th day of September, A. D., 1928, by and between Industrial Addition Association, a Tennessee corporation, party of the first part and Ladd J. Lewis, Jr. of Adrian, Michigan, representing himself and his associates and other affiliated mills, acting for and in behalf of a corporation presently to be formed to be known as the Dyersburg Cotton Products Company, party of the second part, Witnesseth;

Whereas, the party of the first part on March 22, 1928 entered into a certain written contract with Adrian Knitted Products Company of Adrian, Michigan and the Oswego Yarn Mills, Inc. of Oswego, New York, as parties of the

second part, to which reference is here made for the contents and provisions thereof, and;

Whereas, for the considerations in said contract mentioned, the first party obligated itself and intended to obligate itself to construct certain dwelling houses on its property adjacent to the mill site, which it agreed to deed to the second parties, but said obligation was not clearly expressed in said contract, and;

Whereas, the party of the second part herein represents the parties of the second part in said former contract, with other affiliated mills, as fully and to the same extent as they themselves might or could do.

Now, Therefore, for the considerations in this and in said contract of March 22, 1928 expressed and other good and [fo 55] valuable considerations, and in order to clearly and fully state the undertaking and agreement of the parties with respect to the construction of said dwelling houses, it is hereby agreed:

That the party of the first part will, at its own expense, construct upon lots belonging to it or its members adjacent to the mill site of the party of the second part in or near the Town of Dyersburg, Tennessee, One Hundred (100) dwelling houses, said dwelling houses to be completed and ready for occupancy by or before the time said knitting mill, to be erected by the party of the second part and his associates or said corporation, is ready to begin operations.

The party of the first part further agrees that if it is necessary to suitably house the employes of said knitting

mill, it will erect an additional one hundred houses on its said property for the same purpose and upon the same terms and conditions.

Party of the second part agrees for himself and his associates and said corporation that he will not enter into competition with the party of the first part or with the lot owners in said addition by the building of houses on the mill property unless and until it is apparent that there are not enough houses in and around the Town of Dyersburg to supply the needs of the employes of said mill, but nothing in this paragraph shall be understood to modify the above agreement of the first party to construct the number of houses hereinabove set forth.

The party of the first part agrees to rent all of said houses to the party of the second part, and the party of the [fol. 56] second part, for himself and his associates and said corporation to be formed, agrees to rent all of said houses from the party of the first part at a rental charge which will yield to the party of the first part a net return of six (6%) percent per annum on the investment of the party of the first part. The party of the second part agrees to maintain said dwelling houses in a reasonable state of repair at the expense of the party of the second part.

The party of the first part hereby grants the right and option to the party of the second part, his associates and said corporation, or his assigns, to purchase all of the dwelling houses constructed by it on said premises at any time within a period of ten (10) years, at actual cost of construction, plus the value of each lot (the value of each lot being hereby determined and agreed to be Three Hundred ($300.00) Dollars, plus all unpaid rentals.

As a further guarantee of the undertaking and agreement of the party of the first part herein contained, the party of the first part has delivered to the second party and has attached hereto as Exhibit "A" to this agreement the written guaranty, signed by certain of its members, individually, and others, dated March 21, 1928, to which reference is here made.

It is Further Agreed that upon the organization of the corporation to be formed, said corporation may thereupon execute this contract in its own behalf by signing the same at the spaces provided below, without further formality of further reference to the party of the first part, and upon so doing said corporation will be and become a party of the second part to this agreement as fully as if it had executed the same contemporaneously with the other parties hereto, and shall assume the same liability and [fol. 57] have the same right to enforce the provisions of this agreement as any other party hereto now has.

Executed at Dyersburg, Tennessee, this the day and year first above written.

Industrial Addition Association
By N. W. Calcutt
President.

Attest:

R. S. Watkins
Secretary and Treasurer.

Ladd J. Lewis, Jr.
Dyersburg Cotton Products Company

By _____
President.

Attest:

_____
Secretary.

Ex F

We the undersigned having purchased lots in the Addition of the Industrial Addition Association, hereby agree to pool the number of lots set opposite our names, and hereby mutually contract with each other and with the Industrial Addition Association that we will each pay for the number of lots set opposite our names at the rate of $800. per lot, and after a certain portion of land is set apart so as to divide one hundred lots, said land so set apart not to exceed 25 acres, we hereby agree to permit the title to said lots to remain in the Industrial Addition Association and will permit the said Association or Corporation to borrow money on the strength of said title in them thus vested, and execute a mortgage upon said lots to secured the necessary funds with which to erect 100 houses, and will permit officers of the said Association to exercise their own discretion in the contracting and building of said houses.
It being understood that after said houses are built they are to be rented out to the employees of the Textile Mill or other suitable persons, and the rents collected, after deducting the taxes, Insurance and other necessary expenses, which in no case will include any salary to any officer or Director of the Industrial Addition Assoc. will be used to discharge the mortgage indebtedness.

It is further agreed and understood and contracted between the undersigned mutually and with the said Industrial Addition Association, that the said officers of the said Corporation shall have the right to sell any or all of the said houses and lots belonging to the undersigned and apply the proceeds to the discharge of said mortgage indebtedness.
When the said mortgage indebtedness shall hve been fully discharged, then the said officers of the said corporation are authorized to put up the balance of the houses unsold, and sell same to the highest bidder for cash or by private sale on such terms as they deem wise, and will divide the proceeds arising from such sale among the undersigned certificate holders in proportion to the number of certificates so held by each of them.

Done on this the 13th. day of Apral 1926.

[illegible] (5)	[illegible]
[illegible] (3)	Georgia Farm Co. 3
[illegible] (2)	L. B. Hamner (2)
[illegible] (1)	[illegible]
[illegible]	C. E. Davis 3
[illegible]	[illegible]
John M. Scott (2)	[illegible] 2
[illegible]	T. A. Quinn (2)
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

We the Undersigned hereby agree that we will purchase the number of lots set opposite our names from the Industrial Addition Association at a price of $300.00 per lot to be paid for as follows:
$50.00 - April 1st.1928-100.00 October 1st.1928-$150.- December 1st.1928.

[illegible]	2	[illegible]	1
[illegible]	1	[illegible]	1
[illegible]	1	[illegible]	1
[illegible]	1

#4

Notes of the Industrial Additions Association, Dyersburg, Tennessee.

NAME	DATE	AMOUNT
Y. Williams	Nov. 11, 1926	275.00
J. H. Wright	Nov. 15, 1926	100.00
J. H. Wright	Nov. 15, 1926	100.00
Ralph Wyatt	Nov. 12, 1926	275.00
Manly O. Young	Nov. 11, 1926	200.00
Manly O. Young	Nov. 11, 1926	200.00
P. W. Young Jr.	Nov. 11, 1926	400.00
	Total	$47,000.00

Received of the Industrial Addition Association of Dyersburg, Tenn., notes, as per the above list, aggregating $47,000.00, which are being held by me as Trustee for the three Banks of Dyersburg, Tenn., as collateral to loans totalling $55,500.00 which the said Industrial Addition Association has borrowed from the said three banks of Dyersburg, Tenn. (each loans being for $18,500.00, dated August 8, 1928 and due on Demand.

This August 10, 1928.

J.C. Doyle, Trustee.

In addition to the notes listed above it is agreed between the banks and the Industrial Addition Association that 93 lots now unsold in the said said Addition, together with any other lots owned by the said Association, are further security to the notes mentioned above of $18,500.00 each borrowed from the said three banks.

Aug. 10, 1928. J.C. Doyle, Trustee.

[fol. 62] Filed Aug 16 1943

The Tax Court of the United States Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Statement of Testimony in Narrative Form.

The following is a statement of evidence in narrative form in the above-entitled cause.

This cause came on for hearing at Memphis, Tennessee, on the 22nd day of April 1942, before the Honorable C. Rogers Arundell, then Member of the United States Board of Tax Appeals and now Judge of The Tax Court of the United States. The petitioner-taxpayer was represented by H. A. Mihills, Esq., and the Commissioner of Internal Revenue was represented by Frank M. Thompson, Jr., Esq., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue).

After counsel had made their respective opening statements, there was filed a stipulation of facts, which agreement is not set out in this statement of evidence but will be designated separately by the petitioner for review in its Designation of Contents of Record on Review.

[fol. 63] NEWTON WM. CALLICUT, a witness called by the taxpayer, being duly sworn, testified as follows:

Direct Examination.

I live in Dyersburg, Tennessee. I am engaged in agricultural work and the elevator and grain business. At the time of formation of the petitioner corporation I was President of the Mercantile Bank & Trust Co., and a lumber and stave business. I am the President of the petitioner corporation and the only one it ever had.

The organization of the petitioner corporation was prompted by a great many people then not employed, and the business people in general; some were grocery men, some were bankers, some were lumber men, and in all lines of business. This was in the year 1926. Previous to that time we had gone out and solicited outside manufacturers to come in. One of the people called upon was the American Tobacco Company. By putting up a building at a cost of between $20,000 and $25,000 including the lot, which was bought for $5,000, we put up a cigar factory, and the American Tobacco Company employed between three and three hundred and fifty employees, principally young women, but after being there a year or two they made up their mind they would change, instead of making these cigars by hand they would make the cigars by machinery; so they moved all their machinery that they had at Dyersburg to Louisville. That left us with between three and four hundred women and young men of different kind unemployed. Then we organized the business men together, and went out to look for new factories. We finally found that we could get a [fol. 64] factory from Adrian, Michigan, and also part of it from Oswego, and other points in New York State. We got a committee of five of us from Dyersburg, and we went to these points in Michigan, and also in New York State, and negotiated with them to move their plant to Dyersburg. We paid our own fare, we had no money at all, only as individuals, and we induced them to come down there. Then we went into an agreement.

The petitioner corporation was then formed, so that the men could pay $300 or $500 in and take stock; if he got

anything all right, and if he didn't get anything he would not be obligated for any more. Then we formed a corporation and we agreed as an inducement to that corporation to move to Dyersburg we would give them property, houses, and different things, to the amount of $100,000. All of these promises were made before the corporation was organized as they would not move until we made the promises and signed up. We had at that time a Chamber of Commerce, or Business Men's Club, or something of that kind, but this was the general business men of the town, the community. The Civic Club of Dyersburg was the organization that was in existence when the American Tobacco Company came in there with their cigar factory. They participated in the formation of the petitioner corporation which was formed in the latter part of 1926.

As one of the organizers of the petitioner corporation I did not have in mind a corporation to be conducted for [fol. 65] profit. I know men that put $300 in it, bought lots for $300 to go into that, and then sold them a short time afterwards for $50.00, that is sold this equity in a lot. Upon payment of the $300 recited in the stipulation some of the members received certificates of beneficial interest of that amount and some did not. In speaking of selling the rights for $50.00 I meant selling the certificates of beneficial interest which represented the cost of $300. I was one of the subscribers and a participant in what is referred to in the stipulation as the pool plan. The pool plan provided generally for the subscription and the payment forthwith of the sum of $300 for which a certificate of beneficial interest would be issued. I did

not expect to obtain in return at any time any amount in excess of the $300 which I had contributed, plus interest. I have received interest on my certificate up to the present time. I have received no other return from the $300 contribution.

I have not at any time received any salary or other compensation as an officer or director or employee or representative of the petitioner corporation. Nobody, no officer or any one, received any compensation; even the attorneys donated their services. The drawing up of the papers in formation of the petitioner corporation was done by Mr. S. T. Ladd, an attorney in Dyersburg, and his service was donated.

We had only one book. Mr. Watkins was custodian of that book. He was Secretary of the Company. He is [fol. 66] now dead. This book in addition to containing the only minutes of the corporation also contains the amount of the original subscriptions to the petitioner association together with the payments thereon. There were no other books of record, or financial record, ever maintained by the petitioner corporation. It had no ledger, no journal, no cash book and the only source of recording receipts and disbursements would be the bank book. The lease agreement between the petitioner-corporation and the Dyersburg Cotton Products Company was dated February 1, 1929, and there were no meetings of the stockholders or board of directors held thereafter.

The reason for no meetings being held after 1929 was because we had accomplished what we went in to accomplish. We got the mill there and all we have thought

was left was to get what we could out of our $300 lots, what the mill agreed to pay. We had no particular reason; we were not looking after any investment or anything of that kind. Some people were selling their certificate on that lot for $50.00; some were selling it for $100 if they could get that much. The purpose of the petitioner corporation, as recited in its charter, had been accomplished by 1929. I tried to resign in 1930. There was nothing to do. I considered the business closed, but Mr. Watkins and several of the rest of them said, "Well, it is not closed until we get through with it. You better stay on." They persuaded me to just let it run along. We have not at any time prepared any balance sheets or profit and loss statements, since the company was organized.

[fol. 67] The rental payments provided for in the lease agreement of February 1, 1929 have all been made by the Dyersburg Company pursuant to that agreement. It was not necessary to maintain any permanent record of those payments or the division and distribution of them because, on the first day of January and the first day of July we got our rent, and the certificate holders then received their 6 per cent interest as represented by the coupon. We received this at the office of the mill company; they handled all of it. The petitioner corporation had no other income of any kind and no expenses.

I am familiar with the fact that the lease dated February 1, 1929, expired at the close of January 1942. The option to extend the lease period was exercised by the lessee, the Dyersburg Cotton Products Company. I was

notified a month or two months before by letter. I replied to the letter as President of the corporation, that it would be perfectly satisfactory. No meetings of the members of the Association or directors of the Association were held in that connection. Attached to the communication from Dyersburg there was a copy of the lease agreement of February 1, 1929. The exchange of letters, together with the copy of the lease thereto attached, was received in evidence as Petitioner's Exhibit No. 1.

After the last recorded business meeting of petitioner corporation it abandoned all business affairs because of having accomplished the purposes which we originally set out to do. I have no knowledge of the present location of [fol. 68] our corporate seal; it might be in Dyersburg; the scrap iron man might have it; I don't know. As far as I am concerned even the seal has been abandoned.

Cross Examination.

The reason why it was necessary to execute a renewal of the lease was that according to our contract, the original contract, they were to have thirteen years, and at the end of thirteen years they had the option of renewing that for five years, and another thing, they figured at that time they might need the money to carry it along, and we were lending it to them, as we all thought we were lending them that money; if we got it well and good; it was a donation by the citizenship to bring manufacturers to the town. The Industrial Addition Association owned the land and deeded it—cut it up into lots. I believe that some of these beneficial interest certificates issued by the Industrial Addition Association were

bought on a part payment plan. I don't think the Industrial Addition Association ever issued any notes or borrowed any money and we did not have a bank account in our name.

I had just one certificate of beneficial interest. We tried to sell a man two if we could. We wanted to raise the money. I believe I am right in saying that there was more than one sold to one man. We didn't care how many he took if he paid the $300. That was our object in getting the money to bring this manufacturer down here, and the man was privileged to buy as many as he would but I will say this, the majority of them bought one.

[fol. 69] *Re-Direct Examination.*

I testified on cross-examination that the petitioner corporation had no bank account. Mr. Watkins was elected both Secretary and Treasurer. If there was a bank account and checks were issued in the name of the petitioner corporation they would have been signed by Mr. Watkins. I never signed a check. In the event that the stipulation shows that the petitioner corporation made certain payments, it is possible that my recollection or information may be wrong as to whether or not petitioner corporation had a bank account. Mr. Watkins may have conducted those affairs. It was not necessary for me to take any part in it.

L. D. HAMMER, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

I live in Dyersburg, Tennessee. I am Mayor of Dyersburg. I was a subscriber to the articles of association of the petitioner corporation. I was one of the participants in the so-called pool plan for raising money by the petitioner corporation. I was one of the organizers of the petitioner corporation. I was engaged in the cotton business at that time, in 1926. My purpose in subscribing to the pool plan was to attract and induce other industries to come to Dyersburg. It was possible that that would have helped me individually. I wasn't sure. It was more of a civic pride on my part, frankly, because I didn't expect to [fol. 70] get a dime back when I put $600 into the thing, which represents the purchase of two lots, for which I would be entitled to two certificates of beneficial interest. I did not receive those certificates because I sold them for $50.00, before any certificates were issued. I received $50.00 for the $600 which I had paid in for the certificates. When I made my subscription I thought it was a donation. I thought I would have two lots out at the mill, to do what I could with them, if anything. I did not expect to receive any return in excess of the $300 per lot.

The effect of bringing the Dyersburg Cotton Products Company to Dyersburg, Tennessee, was to give employment to about seven or eight hundred people who were unemployed in and around Dyersburg. That company is

the Dyersburg Cotton Products Company and it is still in existence at the present time. It is being conducted as a corporation and successful, as far as I know.

I attended no meetings of the petitioner corporation after 1929 and I do not know whether the petitioner corporation had any meetings after that time. I know of no salaries or compensation or payments of that kind having ever been made to any officer, director, or employee of the petitioner.

Cross Examination.

I never received a certificate. What I sold was any equity that I might have in anything out there. I sold it to Mr. Jim Biggs in the First National Bank. I don't know, frankly, whether I paid $600 in at the time I sold it for [fol. 71] $50.00. I know the first thing was they came around and collected $100 on a lot from each of us; I know I paid $200, and my recollection is now that I had paid either $400 or $600, I have forgotten which. I never received a certificate of beneficial interest. I believe that the sale for $50.00 was in 1932. I have had no connection with the Industrial Addition Association since that time.

Re-Direct Examination.

I recall that the stipulation of facts recites that the subscription of $300, as part of a pool plan contemplated the purchase of one lot in an undivided tract. That is my recollection of the facts. It is my understanding that each member of the pool plan agreed that the petitioner corporation would retain title of the land and might use it for purposes of loans or any other purpose within the charter provisions.

When I sold my interest to the bank I did not give them anything at all. This organization was formed for the purpose of getting money from the citizens of Dyersburg to induce these industries there, and very few of us paid much attention to that part of it. The land was retained by the Industrial Committee or the Industrial Organization to buy and build houses for the benefit of the mill, the people who were working in the mill. There were no deeds to any lots that I know of; I know I never received a deed. I think the Industrial Organization received the title to the lots, because of the fact that they had to issue bonds or did issue bonds in order to get the money to build the houses for the benefit of the mill, and, in addition to that, there was some thirty-five or forty citizens of Dyersburg, [fol. 72] and I was one of them, who had to endorse a paper guaranteeing payments on these bonds. That was retained, the deed to the land and all of that, was retained by the Industrial Corporation in order to provide the money to build these houses that was necessary to get the mill there. It was Mr. J. S. Biggs, the President of the First National Bank, personally that acquired my interest, not the bank. I haven't the slightest idea why he bought it. I didn't ask him. I thought I was picking up $50.00, to be frank. I had nothing to give him. I just got out and he got in. I don't know whether the certificate of beneficial interest was subsequently issued to Mr. Biggs.

T. WALTER ROGERS, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

I live in Dyersburg, Tennessee. I am a merchant. I was one of the original subscribers and a participant in the so-called pool plan of the petitioner corporation. I contributed to the affairs of that corporation by a payment for which I received a certificate of beneficial interest. I bought five lots out there originally and put three of them in the pool, and kept two out. I have since received interest at the rate of 6 per cent on these certificates. I have received no other return on these so-called contributions. We thought maybe some day we might get our money [fol. 73] back; we didn't know. Of course, if we got half of it back it would be a good thing. Anyway, we were not looking for any additional money back. We were trying to induce the factory to come to Dyersburg. We needed them. We had a lot of surplus labor, and business was dull, like all the rest of the towns we needed new manufacturers. I was then engaged and still am now, in the grocery business. Other merchants and business men of Dyersburg participated with me in the negotiations and plans of the petitioner corporation. By making the payment we got one of the best factories in Tennessee, we think, there. To the best of my knowledge the Dyersburg Cotton Products Company is still operating successfully. It employs a considerable number of men and carried us through the depression. I did not attend any meetings of

were any meetings after that time. I don't think there were any salaries or other compensation paid at any time by the petitioner corporation to officers, directors, or any other employees of the petitioner corporation. If they did I didn't know anything about it.

Cross Examination.

I have regularly received the interest on my certificate, except this year. I just haven't been out there after it.

Re-Direct Examination.

In order to have the payment of interest made I carry the bond out there and they mark "interest paid" on the back.

I purchased five lots and put three in the pool. There was just a hundred lots put in the pool. I think there was [fol. 74] three lots we got out of this tract of land. We bought and sold them for $300. You could put one or more in the pool if you wanted to, so I put three in the pool and kept two out. There are several lots out there yet. I don't know where my other two are, but they are out there somewhere. I have a deed for them. The pool plan included only those lots which were being sold for the purpose of deriving the required amount of money to construct the houses. There were other lots subscribed for by the contributors to the plan. In other words, the Industrial Association had a tract of land in which they sold an undivided portion for the pool plan and also a separate part of the tract.

KENNETH SMITH LEWIS, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

I live in Dyersburg, Tennessee. I am a jeweler. I have been engaged in the same business ever since petitioner corporation was formed. I was one of the participants in the so-called pool plan. I was not one of the subscribers to the plan which was brought about and which culminated in the organization of the petitioner corporation. I purchased one of the lots in the pool. I did not receive a certificate of beneficial interest representing or evidencing my payment. I paid $50.00 down on my lot just as a public donation affair, and later I sold my interest in it. It was my understanding that no certificate would be is- [fol. 75] sued until the $300.00 was completely paid for in accordance with the plan. I was prompted to become a participant in the plan and make the payments as a public spirited citizen. I wanted to do my part to try to obtain a factory for Dyersburg. The plan adopted was participated in by most of the merchants and business men of Dyersburg who tried to help. We obtained for Dyersburg a very fine plant which is now in operation. I derived some benefit from the payment through additional business being obtained. The main object of the payment was to relieve unemployment, and by employing those persons I felt I would indirectly obtain some benefits for my store. I have received no other return from my payment than the proceeds of the sale. I did not attend any meetings of the petitioner corporation after 1929 and I know of no such meet-

ings being held. So far as I know there were no salaries or other compensation paid to officers, directors, or employees of the company.

Cross-Examination

The sale of my rights was made possibly a year after my payment. I paid my $50.00 at the time they brought around the petition to sign to purchase. I just lost my $50.00. I had not put up $300. I had put up $50.00. I just released my equity in the certificate. Of course, I hadn't received one. I didn't get anything for my equity. I lost $50.00. I didn't sell anything. I just donated $50.00 to it. I released it.

[fol. 76] The foregoing, together with the stipulation of facts, constitutes all of the evidence material to the issue presented in the petition for review.

(Signed) H. A. Mihills,
(Signed) F. A. Berry,
Attorneys for Petitioner on Review

No objection:

(s) J. P. Wenchel
Chief Counsel, Bureau
of Internal Revenue

[fol. 77] Endorsed: Filed: Aug 16 1943

The Tax Court of the United States Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Designation of Contents of Record on Review.

Industrial Addition Association, the petitioner, by its attorneys, H. A. Mihills and F. A. Berry, designates the

following portions of the record, proceedings and evidence, to be included in the Record on Review in the above-entitled proceeding:

1. Petitioner of Industrial Addition Association, together with "Exhibit A" attached thereto.

2. Answer of the Commissioner of Internal Revenue.

3. Findings of Fact and Opinion by The Tax Court of the United States entered December 30, 1942, in this proceeding.

4. Decision by The Tax Court of the United States entered March 12, 1943 in this proceeding.

5. Petition for Review, by the Circuit Court of Appeals for the Sixth Circuit, filed by petitioner, Industrial Addition Association.

6. Stipulation of counsel for Industrial Addition Association and counsel for Commissioner of Internal Revenue, together with Exhibits A, B, C, D, and E attached thereto.

7. Transcripts of all entries appearing on Docket No. [fol. 78] 103753 of The Tax Court of the United States and of United States Board of Tax Appeals.

8. Statement of testimony in narrative form, in the hearing conducted at Memphis, Tenn., on April 22, 1942.

9. Statement of points on which petitioner intends to rely on review, filed with this Designation of Contents.

10. This Designation of Contents.

11. Proof of Service of this Designation of Contents, and of Statement of Testimony in Narrative Form, and

of Statement of Points on Which Petitioner Intends to Rely on Review.

12. Certificate of Clerk to the Record on Review made pursuant to this Designation of Contents.

(Signed) H. A. Mihills,
917 Munsey Bldg.,
Washington, D. C.

(Signed) F. A. Berry,
1900 American Trust Bldg.,
Nashville, Tenn.
Counsel for Petitioner.

Service acknowledged, 8/16/43

J. P. Wenchel,
Chief Counsel, Bureau of Int. Rev.

The Tax Court of the United States Washington Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 103753

Certificate.

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 78, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of August, 1943.

B. D. Gamble,
Clerk, The Tax Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PROCEEDINGS.

Respondent's Motion to Dismiss.

(Filed: February 7, 1944)

Comes now the respondent, by his counsel, and respectfully moves the Court to dismiss the petition for review filed herein for the following reason:

The jurisdiction of the Court to entertain the petition rests upon Sections 1141 and 1142 of the Internal Revenue Code. This is a case in which the taxpayer filed no returns for the taxable years. In such cases the proper venue is the United States Court of Appeals for the District of Columbia unless there is filed within three months after the entry of the decision of the Tax Court a written stipulation designating another court as the court of review. The stipulation in the instant case was entered into on July 10, 1943, after the expiration of the three-month period and with a reservation of the question now presented. It was therefore ineffective and this Court is without jurisdiction to entertain the petition for review.

Stipulation.

(Filed: February 17, 1944)

It is hereby stipulated and agreed by the petitioner and the respondent, pursuant to Section 1141(b)(2) of the Internal Revenue Code, subject to the conditions set forth

in paragraph 2 hereof, that the United States Circuit Court of Appeals for the Sixth Circuit is designated as the Circuit Court of Appeals which may review the decision of The Tax Court of the United States in the case of *Industrial Addition Association, Petitioner* v. *Commissioner of Internal Revenue, Respondent*, B. T. A. Docket No. 103753, in which petition for review by the United States Circuit Court of Appeals for the Sixth Circuit was filed by the taxpayer on June 11, 1943.

Petitioner and respondent mutually agree that respondent's signature on this stipulation shall not in any manner affect his right to question its timeliness and legal effect and or his right to move to dismiss petition for review for want of jurisdiction.

Dated this 10th day of July, 1943.

Cause Argued and Submitted.

(February 17, 1944)

Before: Hicks, Hamilton & McAllister, JJ.

This cause is argued by F. A. Berry for Petitioner and by Melva Graney for Respondent and is submitted to the court.

Judgment.

(Entered: March 27, 1944)

On petition to review the decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the motion of respondent to dismiss the petition for review be and the same is hereby sustained.

Opinion.

(Filed: March 27, 1944)

United States Circuit Court of Appeals Sixth Circuit Industrial Addition Association, Petitioner, v. Commissioner of Internal Revenue, Respondent. No. 9629

On Petition to Review the Decision of the Tax Court of the United States.

Decided March 27, 1944.

Before Hicks, Hamilton and McAllister, Circuit Judges.

Hicks, Circuit Judge. Petition for review of the decision of the Tax Court finding deficiencies in income taxes and penalties for the years 1932 to 1936 inclusive. We are confronted with a motion to dismiss which raises the question of our jurisdiction to entertain the petition.

Sec. 1142 of the Internal Revenue Code [26 U. S. C., Sec. 1142] in so far as is here material, provides that,—

> "The decision of the Board . . . may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, *as provided in Sec. 1141 if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered*, . . ." (Italics ours.)

The section is jurisdictional. If in the ordinary case the petition for review were filed later than three

months we may not entertain it. *Commissioner* v. *Realty Operators, Inc.*, 118 Fed. (2d) 286, 288 (C. C. A. 5); *Smith* v. *Commr.*, 67 Fed. (2d) 167 (C. C. A. 4); *Forest Glen Creamery Co.* v. *Commr.*, 123 Fed. (2d) 523 (C. C. A. 7). The decision of the Board was entered on March 12, 1943, and the petition to review was filed on June 11 following, or one day within the three months' period. Therefore, other questions out of the way, the petition was timely.

But, petitioner filed no returns for the years in question, and in such case, under Sec. 1141(b)(1) of the Internal Revenue Code [28 U. S. C., Sec. 1141(b)(1)] review must normally be sought in the Court of Appeals for the District of Columbia. However, Sec. 1141(b)(1) is modified in the paragraph immediately following, to wit, Sec. 1141(b)(2), to permit review by "any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

Petitioner was a Tennessee corporation with its principal offices within this Circuit, at Dyersburg, Tennessee. A "stipulation in writing," made necessary by the next above quoted statute, and purporting to give this court jurisdiction, was entered into on July 10, 1943, or twenty-eight days after the expiration of the three months' period, with reservation by the Commissioner that his signature should "not in any manner affect his right to question its timeliness and legal effect and or his right to move to dismiss petition to review for want of jurisdiction."

The petition to review filed in this court on June 11, 1943, did not confer jurisdiction upon us, for upon that date the jurisdiction for review was exclusively in the Court of Appeals for the District of Columbia. The provisions of Section 1141(b)(2) conferring jurisdiction upon us upon a written stipulation between the Commissioner and the taxpayer, had not then been complied with. Compliance with this provision was a prerequisite for review by this court. Such is the plain meaning of Section 1142.

The question raised by the motion to dismiss is whether an invalid petition filed within the three months' period can be validated by a stipulation between petitioner and the Commissioner entered into after that period had elapsed and thereby confer jurisdiction upon this court. Petitioner contends that it can, the argument being that since Section 1141(b)(2) designated no time within which the stipulation might be entered into, it was effective even though signed after the three months' period had expired. We cannot agree.

There is no statute which permits an extension of the three months' period for any reason or under any circumstances. As we have pointed out, Sec. 1142 is jurisdictional and mandatory. This has been so held in a harsh case where the Clerk of the Board of Tax Appeals failed to notify a taxpayer that the Board had entered a decision in its case. *Commissioner* v. *Realty Operators, Inc.*, *supra*. It has also been held in cases where the question related to the designation of the proper circuit court of appeals in the stipulation. *Nash-Breyer Motor Co.* v. *Burnet, Commr.*, 283 U. S. 483; *Mass. Fire & Marine Ins.*

Co. v. *Commr.*, 42 Fed. (2d) 189 (C. C. A. 2). To say, as petitioner contends, that the filing of the petition to review on June 11, 1943, vested this court with some sort of incomplete and inchoate jurisdiction which was consummated by the stipulation of July 10th, would have the effect of extending indefinitely, subject only to the concurring will of the Commissioner and the taxpayer, the three months' period of limitation. We find no basis for such conclusion and we do not think that Congress intended such result. The trend of Congressional action has been to restrict rather than extend the time within which a petition to review a decision of the Board of Tax Appeals (now the Tax Court) may be filed. The fact that Sec. 1141(b)(2) fixes no period of time for filing the stipulation in question is not controlling. This section must be read in connection with Sec. 1142 which makes express reference to it. We are aware that the opinion in *Wegener* v. *Commr.*, 119 Fed. (2d) 49 (C. C. A. 5), reaches a contrary conclusion, but we are not in harmony with the decision in that case.

The motion to dismiss is sustained.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Record and Proceedings in the case of Industrial Addition Association vs. Commissioner of Internal Revenue No. 9629, as the same remains upon the files and records of said United

States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 31st day of March, A. D. 1944.

J. W. Menzies
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
JUN 2 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1067 10

INDUSTRIAL ADDITION ASSOCIATION, A CORPORATION UNDER THE LAWS OF TENNESSEE, WITH PRINCIPAL OFFICE IN DYERSBURG, TENNESSEE,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. A. BERRY,
Attorney for Petitioner.

BASS, BERRY & SIMS,
1000 American Trust Building,
Nashville, Tennessee,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No.

INDUSTRIAL ADDITION ASSOCIATION, A CORPORATION UNDER THE LAWS OF TENNESSEE, WITH PRINCIPAL OFFICE IN DYERSBURG, TENNESSEE,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner, Industrial Addition Association, is a corporation under various Acts of the Tennessee Legislature:

Acts of 1874, Chapter 142, as amended in 1895, Chapter 358, and 1925, Chapter 3, now appearing in the Code of Tennessee of 1932 in Sections 4146 to 4186, inclusive. Charters under this Section are organized for the general welfare of society, not individual profit. This corporation borrowed certain funds in various ways and erected houses for employees of an industrial plant to be located in the Town of Dyersburg, known as Dyersburg Cotton Products Company, and later reorganized as Dyersburg Cotton Products, Inc. Petitioner filed no returns for income taxes to the Internal Revenue Collector of the United States for the District of Tennessee. On April 16, 1940, the Internal Revenue Agent in Charge, Nashville Division, sent to Petitioner a letter claiming liability for the taxable years ending December 31, 1932, to 1936, inclusive. The aggregate deficiency claimed being $14,920.59. On July 10, 1940, Petition was filed in the Tax Court of the United States (at the time United States Board of Tax Appeals) and with certain adjustments to the amounts claimed, the decision of the Commissioner was affirmed. The question presented to the Tax Court was the claimed exemption of Petitioner from tax, under provision of Section 101(7) or 101(8) of the 1934 and 1936 Revenue Acts, and similar provision of Section 103 of the 1932 Act. On December 30, 1942, the Opinion of the Tax Court was entered sustaining the Commissioner. Decision was thereafter rendered March 12, 1943. On June 11, 1943, and within three months, Petitioner filed with the Tax Court a Petition for Review, which was addressed to, and sought review of the Tax Court's decision by, the Circuit Court of Appeals for the Sixth Circuit, the Petition being filed pursuant to U. S. C. A., Title 26, Sec. 1141.

The venue of the action is provided in Sec. 1141, U. S. C. A., Title 26, and permits review "by the Circuit Court of Appeals for the Circuit in which is located the Collector's Office to which was made the return of tax in respect of which the liability arises, or if no return was made, then by the United States Court of Appeals for the District of Columbia."

Section 1141(b)(2) provides:

> "Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

Taxpayer filed no return for the years in question with any Collector claiming to be exempt from this tax. On the 10th day of July, 1943, a Stipulation in writing, pursuant to the foregoing section, was entered into by the Commissioner and the Taxpayer, designating the United States Circuit Court of Appeals for the Sixth Circuit as the Circuit Court of Appeals to review the decision of the Tax Court. This Stipulation (Record pp. 97-98) contained an agreement "that Respondent's signature on this Stipulation shall not in any manner affect his right to question its timeliness and legal effect and or his right to move to dismiss Petition for Review for want of jurisdiction."

This Stipulation did not appear in the Record presented to the Sixth Circuit. An original signed copy thereof was presented, and, without objection, was ordered filed on February 17, 1944, and now appears in the Record (Record pp. 97-98) showing it was executed July 10, 1943. Respondent moved to dismiss the Petition for

Review (Record p. 97), admitting the Stipulation was entered into on July 10, 1943, with the reservation hereinabove quoted. The ground of the Motion being that the Stipulation was entered into after the expiration of the three-month period, and was therefore ineffective, and the Sixth Circuit Court was without jurisdiction to entertain the Petition for Review.

The Circuit Court of Appeals held that Section 1142 was jurisdictional and mandatory, and therefore the Stipulation of July 10, 1943, was executed after the expiration of the three-month period and was void and of no effect, and sustained the Motion to Dismiss without passing upon the merits of the case.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Opinion of the Circuit Court of Appeals is not yet reported, but appears in full in the Record page 99. *et seq.*

This Opinion and the judgment entered thereon is directly in conflict with the Opinion and Decision of the Circuit Court of Appeals for the Fifth Circuit in *Wegener v. Commissioner*, 119 F. 2d 49.

The question being an important one, and there being a direct conflict between two of the Circuit Courts of Appeal, the matter is brought here for determination by this Court.

There is annexed hereto and presented herewith, as a part of this Petition, a certified copy of the entire Record in this cause in the Circuit Court of Appeals for the Sixth Circuit, Specification of Error and Brief and Argument, stating the reasons why Petitioner alleges the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit is erroneous and should be reversed.

and it is respectfully requested that the certified copy of the Record, Specification of Error, Brief and Argument, be considered in connection with, and as a part of this Petition for the purpose of testing the correctness of the ruling complained of.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is under Judicial Code, Sections 204 and 262 as Amended, U. S. C. A., Title 28, Sec. 347.

PRAYER FOR WRIT.

Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete Transcript of the Record and all proceedings in the case, cited on its Docket 9629, entitled Industrial Addition Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and that said judgment be reversed and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem mete and just.

Respectfully submitted,

F. A. BERRY,
Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

INDUSTRIAL ADDITION ASSOCIATION, A CORPORATION UNDER THE LAWS OF TENNESSEE, WITH PRINCIPAL OFFICE IN DYERSBURG, TENNESSEE,
PETITIONER.

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit in this cause has not yet been officially reported, but appears in the Record at page 99. The Opinion and judgment of the Circuit Court of

Appeals were handed down and entered on March 27, 1944.

II.

STATEMENT OF THE CASE.

The facts have been succinctly and substantially stated in the Petition, and may be shortly restated as follows:

The Petitioner on June 11, 1943, filed in the Circuit Court of Appeals for the Sixth Circuit a Petition to Review a decision of the Tax Court of the United States entered March 12, 1943. This was within the three-month period.

No tax return to any Collector of Internal Revenue had been filed by Petitioner in respect of which the liability claimed by the Commissioner, arises.

U. S. C. A., Title 26, Sec. 1141, provides that the venue of this Appeal is in the Court of Appeals for the District of Columbia, unless and except another Circuit Court of Appeals be designated by the Commissioner and the Taxpayer by stipulation in writing. This designation, in conformity with the Statute, was entered into on July 10, 1943, but after the expiration of the three-month period. The question presented here is whether or not this Stipulation, entered into while this Appeal was pending in the Court of Appeals for the Sixth Circuit and before dismissal, clothed the Court of Appeals for the Sixth Circuit with jurisdiction and venue to hear and determine this case on its merits, or whether the Taxpayer is now precluded from asking any review of its case.

III.

SPECIFICATION OF ERROR.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the Stipulation in writing entered into on July 10, 1943, and filed in this cause, designating the United States District Court for the Sixth Circuit to review the decision of the Tax Court of the United States in this cause was void and of no effect, in that it was executed more than three months from the date of the entry of the decision of the Tax Court.

2. The United States Circuit Court of Appeal for the Sixth Circuit erred in holding that the Statute of the United States, U. S. C. A., Title 26, Sec. 1141, permitting a stipulation in writing to be filed designating the Court of Appeals of Taxpayer's domicile to review a decision of the Tax Court of the United States, required such stipulation to be entered into and filed within three months after the entry of the decision of the Tax Court.

IV.

ARGUMENT.

Petitioner in this cause alleges that it is a corporation organized for general welfare and not for profit and is therefore not liable for the taxes assessed against it by the Commissioner. The cause is not now before this Court upon the merits of this cause, but only upon the question as to whether or not the venue of this cause was properly vested in the United States Circuit Court of Appeals for the Sixth Circuit by reason of the Stipulation in writing entered into between the Commissioner and Petitioner. The merits of the cause have not been passed upon, but only the question of venue.

The sole office of the Petitioner is in Dyersburg, Tennessee, a small town in the Western part of that State. All investigations made by the Collector were in the State of Tennessee, and the hearing before the Tax Court was in Memphis, Tennessee. By reason of Taxpayer's failure to file a return it would seem unjust and unreasonable to compel this small company, virtually without resources, to journey from Tennessee to the District of Columbia in order to make out its Appeal and present its case. Evidently, to correct this injustice, the Congress of the United States passed the Act relied upon here. U. S. C. A., Title 26, Sec. 1141, Subsec. (b)(2), provides that the Commissioner and the Taxpayer, by Stipulation in writing, may designate any Circuit Court of Appeals to review a decision of the Tax Court.

The Commissioner is given discretion as to whether he will enter into a Stipulation. Remedial Statutes of this kind always presume that the official, clothed with power to consent, will exercise his discretion fairly and reasonably, without abusing the confidence reposed in

by the Government, and with equal justice to the [illegible] of the Taxpayer.

The logical Court to which the Petition for Review should be first addressed is the Sixth Circuit Court of Appeals which is located in the district in which the office of the Collector who conducted all proceedings is located and in which the sole and only office of Taxpayer is located. Evidently, the Commissioner concurred in this view of the matter and on request, signed a Stipulation in writing conferring venue on the Circuit Court of Appeals for the Sixth Circuit. At the time, only one case had decided the issue squarely, and this case confirmed the authority of the Commissioner to consent to venue after the expiration of the three-month period. Petitioner continued to pursue its remedies and to incur expense after the Petition was filed in the Sixth Circuit, relying upon *Wegener* v. *Commissioner*, (5th Circuit) decided April 7, 1941, 119 F. 2d 49.

In the Wegener case it was conceded the Appeal should properly have been taken to the Tenth Circuit, but was erroneously taken to the Fifth Circuit. In that case, as in the case at bar, a Stipulation in writing, pursuant to the Statute, was necessary to give the Reviewing Court venue of the case. Before hearing of the case and before its dismissal, but after the expiration of the three-month period, a Stipulation in writing, practically identical with the one here relied upon by this Petitioner, was signed by the Commissioner and the Taxpayer, designating the Court of Appeals for the Fifth Circuit as the Court to review the decision. In that case, as in the case at bar, a reservation was made permitting the Commissioner to move to dismiss the case for failure to file, or enter into a stipulation in writing, within a period of three months after the decision of the Tax Court was entered.

In a case on this Motion, the Court of Appeals for the Fifth Circuit said in part:

> "We are clear that consent was given, with authority, and that it was effective to confer jurisdiction upon this Court as if it had been given before the Petition for Review was filed."

In the Wegener case the Commissioner contended that the right of the Commissioner to consent is limited to a three-month period and having been given after the expiration of that period was ineffective. An examination of the Statute will show no such limitation as to the time of consent, and the Court in the Wegener case simply states that it refuses to write such a limitation into the Statute.

In *Spring Canon Coal Co. v. Commissioner*, 23 F. 2d 104 (Fourth Circuit) decided February 10, 1930, the Statute under consideration is considered and the Court there holds that the Statute is remedial in permitting by consent, the Circuit Court of Taxpayer's domicile to be vested with venue to hear cases such as this. The Court states that the Statute is not so broad as to permit any court for and reason to be selected.

In *Massachusetts F. & M. Ins. Co. v. Commissioner*, 42 F. 2d 189 (Second Circuit), decided June 9, 1930, it is held that this Statute only permits the Circuit Court in that District in which Taxpayer has his domicile to be designated; and that the choice of courts was not unlimited. This Court reviewed the proceedings both in the House and Senate regarding the Statute.

In the case at bar, the Court of Appeals first determines that the Petition for Review must be filed within the three-month period, and in a court in which jurisdiction and venue are conclusively vested at the time of

when the three-month period actually expired, the Court of Appeals for the Sixth Circuit did not have jurisdiction and venue for the reason that the Stipulation designating that Court had not then been entered into or filed. In other words, the Sixth Circuit takes a position directly opposed to the position of the Fifth Circuit and writes a limitation of time into the Statute and holds explicitly that unless the court in which the Petition is filed actually has at the time of filing, or, at any rate, within the three-month period, complete jurisdiction, either by direction of the Statute or the prior execution of a Stipulation, that the court is without jurisdiction, and, therefore, the Petition should be dismissed on Motion. The case of *Massachusetts F. & M. Ins. Co. v. Commissioner, supra*, is referred to, and also the case of *Nash-Breyer Motor Co.* v. *Commissioner*, (2nd Circuit) 42 F. 2d 192, which was dismissed on the authority of the first named case. The latter case was taken to this Court by certiorari, which was granted, the case set down for Argument, and it was affirmed by Opinion in 283 U. S. 835, 75 L. Ed. 1180.

This Court in the Nash-Breyer case refers to the question of venue and disposes of an artificial choice of venue, saying this was never meant; and among other expressions, says

> "Venue of the Federal Courts generally turns upon the geographical location of the parties and is never within their exclusive control."

And further says,

> "'The Circuit Court of Appeals for the Circuit' —seem to refer, not to the court of appeals for any circuit, but to some particular circuit court of appeals previously described, necessarily that one which could have entertained the petition, under (a), (b) or (c), of an agreement under (d)."

In providing for Appeals to the District of Columbia, we respectfully insist that Congress did not mean to deprive a Taxpayer of right to appeal to courts of the circuit in which he resided. The evil sought to be remedied is to fix venue where it is uncertain and cannot be readily determined. Many persons are assessed for taxes, who apparently have no fixed domicile, and consequently the court to which they should appeal is uncertain. In such instances Congress has provided an arbitrary court. In cases, however, where the Taxpayer has a fixed domicile there appears no intention to deprive Taxpayer of the right to appeal to courts within the District of domicile. This seems to be clear. There is an incomplete and inchoate venue and jurisdiction in courts of taxpayer's domicile where there is a fixed domicile, even though no returns have been filed. This venue and jurisdiction becomes complete and definite, as well as exclusive, by filing a Stipulation, as was done here. At the time taxpayer filed Appeal in the Sixth Circuit the only decision on this point was *Wegener* v. *Commissioner*, *supra*. To now deny Taxpayer the right of review of this case on the merits would seem both unfair and an injury not contemplated by the Congressional Act, and not justified by the language of the Act. To deny Petitioner relief is to write a time limitation in the Act not written there by Congress.

We respectfully submit that the Court of Appeals for the Sixth Circuit should be reversed and the cause remanded for further proceedings on the merits.

Respectfully submitted,

F. A. Berry,

Attorney for Petitioner.

Bass, Berry & Sims,

No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1944

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 118

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals sustaining the respondent's motion to dismiss the petition for review (R. 99–102) is reported at 141 F. 2d 636. The findings of fact and opinion of the Tax Court of the United States in the case (R. 27–42) are reported in 1 T. C. 358.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 27, 1944 (R. 98–99). The

petition for a writ of certiorari was filed June 2, 1944. The jurisdiction of this Court is invoked under Sections 240 (a) and 262 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, should have undertaken to review the decision of the Tax Court notwithstanding the fact that a written stipulation, which was required by the statute, designating the Circuit Court as the court to review the case, was not entered into until after the expiration of the three-month appeal period, although a petition for review was filed within the period.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 1141. COURTS OF REVIEW.

(a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, * * *.

(b) *Venue.*—

(1) *In General.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return

of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) *By Agreement.*— Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

* * * * *

(26 U. S. C., Sec. 1141.)

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *. (26 U. S. C., Sec. 1142.)

STATEMENT

On July 10, 1940, petitioner filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermination of deficiencies in income and excess profits taxes, together with penalties for failure to file returns, for the calendar years 1932 to 1936, inclusive, claiming that it was exempt from taxation

under the provisions of Section 103 (7) or (8) of the Revenue Act of 1932 and corresponding provisions of Section 101 of the Revenue Acts of 1934 and 1936 (R. 3–23). The Commissioner filed an answer (R. 25–27) and a hearing was held on the merits (R. 1). On December 30, 1942, the Tax Court filed its findings of fact and opinion, holding that while petitioner was not subject to the excess profits tax it was not an exempt corporation and was liable for income taxes and penalties for the taxable years (R. 27–42). The decision of the Tax Court was entered on March 12, 1943 (R. 42–43).

On June 11, 1943, one day before the expiration of the three-month appeal period allowed by Section 1142 of the Internal Revenue Code, petitioner filed a petition for review addressed to the Circuit Court of Appeals for the Sixth Circuit (R. 43–45). When the case subsequently came to the attention of the Department after the expiration of the appeal period, petitioner's counsel was advised that the Circuit Court of Appeals for the Sixth Circuit lacked jurisdiction to entertain the petition for review, since no written stipulation designating that court as the one to review the case had been entered into, as required by Section 1141 of the Internal Revenue Code. While the Commissioner believed that a stipulation entered into after the expiration of the appeal period would be ineffective to confer jurisdiction on the

Circuit Court, such a stipulation, reserving the Commissioner's right to file a motion to dismiss the petition for review and to question the timeliness and legal effect of the stipulation, was nevertheless executed on July 10, 1943 (R. 97–98).

The Commissioner subsequently filed a motion to dismiss the petition for review (R. 97), and the merits of the motion and of the case itself were briefed and argued together in the court below. On March 27, 1944, the court entered judgment sustaining the motion to dismiss (R. 98–99), and it is this judgment which petitioner seeks to have this Court review.

ARGUMENT

Petitioner's contention that the court below should have entertained the petition for review is correct only if Sections 1141 and 1142 of the Internal Revenue Code, *supra,* are to be interpreted as giving the parties to a proceeding before the Tax Court the power, after the expiration of the three-month appeal period, to confer jurisdiction on a Circuit Court of Appeals to entertain such a petition and to require it to do so. In arguing that Sections 1141 and 1142 should be so interpreted, petitioner for the most part relies upon the fact that in similar circumstances the Circuit Court of Appeals for the Fifth Circuit sustained jurisdiction in *Wegener* v. *Commissioner,* 119 F. 2d 49, certiorari denied, 314 U. S.

643[1] (Br. 10-14). The Government does not object to a resolution of the conflict between the decision in the *Wegener* case and that in the instant case by means of certiorari. We respectfully suggest, however, that the decision below is correct and that the problem may not be important. The matter is within the control of Government officers, and the issue is in any event a narrow one, arising only rarely.

In the *Wegener* case, the Circuit Court of Appeals for the Fifth Circuit held that a stipulation, practically identical to the one entered into in this case, was effective to confer jurisdiction on that court after the expiration of the appeal period, because Section 1141 of the Internal Revenue Code "fixes no time for making the agreement" and because the court found "no reason for writing such a limitation into the statute" (p. 49). The court below held to the contrary (R. 102). The question involved will not recur unless the Commissioner enters into the same type of stipulation under similar circumstances in the future. His authority to do so is discretionary, as petitioner admits (Br. 10). On the merits the court below seems clearly to be right. Section 1142 limits Section 1141 by

[1] This case was decided against the taxpayer on the merits, and it was the taxpayer who petitioned for a writ of certiorari. Accordingly, the present question was not involved in the petition.

imposing a three-month time limit upon the filing of petitions. This limitation is not stated or referred to in Section 1141 itself. No reason appears for not applying the same limitation to the filing of a stipulation pursuant to subsection (b) (2) of Section 1141, which is a prerequisite to filing a petition in the chosen court.

The two sections obviously are to be construed together. The jurisdiction conferred by Section 1141 cannot be exercised if a petition for review is not filed as required by Section 1142; compliance with the latter section is a jurisdictional requirement. *Commissioner* v. *Realty Operators, Inc.*, 118 F. 2d 286, 288 (C. C. A. 5th); cf. *Smith* v. *Commissioner*, 67 F. 2d 167 (C. C. A. 4th). Such a petition cannot be filed in a proper court, other than one designated in subsection (b) (1) of Section 1141, until the parties have selected the court by stipulation in writing. Until that has been done, a petition for review is not a petition for "such" review as is provided in Section 1141; and this is the only review for which a petition may be filed, under the express terms of Section 1142.

The provisions of predecessor enactments to subsections (b) (1) and (2) of Section 1141, although styled as relating to venue, have been regarded as defining the jurisdiction of the several Circuit Courts of Appeals. A petition brought to the wrong court should be dismissed. *Burnet*

v. *White Eagle Oil & Refining Co.*, 58 F. 2d 141 (C. C. A. 8th); *Ayer* v. *Commissioner*, 63 F. 2d 231 (C. C. A. 2d); *Holmstrom* v. *Commissioner*, 94 F. 2d 747 (C. C. A. 3d). Even if the effect of these subsections is to prescribe venue but not to restrict jurisdiction, the court below was not bound to exercise jurisdiction in the face of a petition and stipulation which did not conform to the statute. *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483, 487.

It is a well-settled rule that statutory periods for appeal go to the jurisdiction of the appellate courts. *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Decker* v. *United States*, 97 F. 2d 473 (C. C. A. 5th). It follows that neither the parties nor a court can extend the period by agreement or order. *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137; *Commissioner* v. *Realty Operators, Inc.*, 118 F. 2d 286 (C. C. A. 5th). It would conflict with this principle to hold that, after the statutory period for filing a petition to review a decision of the Tax Court had expired, a taxpayer and the Commissioner might confer authority to proceed upon a Circuit Court of Appeals by filing a stipulation which for the first time designated that court as the proper one to entertain the proceeding.

A contrary holding to that below would also go counter to the provision of Section 1140 of the Internal Revenue Code that—

> The decision of the Board [Tax Court] shall become final—
>
> (a) * * * Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

By virtue of this provision the Tax Court's decision in this case ripened into a final order in favor of the Government. The taxpayer clearly did not prevent that right from attaching by filing a petition for review in a court of his own choosing, without statutory authority. Neither, it would seem, could the Commissioner defeat the Government's right afterward, by stipulation or otherwise; for it is settled that he lacks power to waive periods of limitation under the tax laws. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533–534. See *Wilber Nat. Bank* v. *United States*, 294 U. S. 120.

Petitioner argues that Congress had no intention of depriving a taxpayer, whether or not he filed a return, of a right of appeal to the Circuit Court of the circuit in which he is domiciled and that it is unfair to deny petitioner the right of appeal after it relied on the *Wegener* decision as establishing that the court below had jurisdiction (Br. 11, 14). These arguments, however, cannot change the statute as written, which does not accord with petitioner's contentions. It is unfortunate, but of no legal consequence, that the right of appeal was lost through inadvertence.

CONCLUSION

The decision of the court below is correct, and the conflict between it and the decision in *Wegener v. Commissioner, supra,* should present no important question of law for the future.

Respectfully submitted.

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JUNE 1944.

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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1944

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 118

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals, sustaining the respondent's motion to dismiss the petition for review (R. 99–102), is reported in 141 F. 2d 636. The findings of fact and opinion of the Tax Court of the United States on the merits of the case (R. 27–42) are reported in 1 T. C. 378.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 27, 1944 (R. 98–99). The petition for certiorari was filed on June 2, 1944,

and granted on October 9, 1944, at which time the case was transferred to the summary docket (R. 103). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below had jurisdiction, under Sections 1141 and 1142 of the Internal Revenue Code, to review the decision of the Tax Court on the merits even though the required stipulation designating that court as the proper reviewing court was not entered into until after the expiration of the three-month appeal period prescribed by Section 1142.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 1141. COURTS OF REVIEW.
>
> (a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, * * *.
>
> (b) *Venue.*—
>
> (1) *In General.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United

States Court of Appeals for the District of Columbia.

(2) *By Agreement.*—Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

* * * * *

(26 U. S. C. 1141.)

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *. (26 U. S. C. 1142.)

STATEMENT

On July 10, 1942, petitioner, a Tennessee corporation with its principal office in that State, filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermination of deficiencies in income and excess profits taxes, together with penalties for failure to file returns, for the calendar years 1932 to 1936, inclusive, claiming that it was exempt from taxation under the provisions of Section 103

(7) or (8) of the Revenue Act of 1932 and corresponding provisions of Section 101 of the Revenue Acts of 1934 and 1936 (R. 3–23). The Commissioner filed an answer (R. 25–27) and a hearing was held on the merits (R. 1). On December 30, 1942, the Tax Court filed its findings of fact and opinion, holding that while petitioner was not subject to the excess profits tax it was not an exempt corporation and was liable for income taxes and penalties for the tax years involved (R. 27–42). The decision of the Tax Court was entered on March 12, 1943 (R. 42–43).

On June 11, 1943, one day before the expiration of the three-month appeal period prescribed by Section 1142 of the Internal Revenue Code, petitioner filed a petition for review addressed to the Circuit Court of Appeals for the Sixth Circuit (R. 43–45). Petitioner's counsel was advised by the Commissioner that the Circuit Court of Appeals for the Sixth Circuit lacked jurisdiction to entertain the petition for review, since no written stipulation designating that court as the one to review the case had been entered into, as required by Section 1141 of the Internal Revenue Code. However, at the request of petitioner's counsel, the Commissioner entered into such a stipulation on July 10, 1943, although entertaining serious doubts as to its timeliness and as to his power as an administrative officer to agree to waive any right which the Government might have to insist upon the dismissal of the

petition. The Commissioner was moved to enter into this stipulation because he did not desire, by his own refusal to act, to become the final arbiter of his own statutory power to enter into such a stipulation. Therein, however, it was specifically agreed that the Commissioner should have the right to file a motion to dismiss the petition for review and to question the timeliness and legal effect of the stipulation. (R. 97–98.)

The Commissioner subsequently filed a motion to dismiss the petition for review (R. 97), and the merits of the motion and of the case itself were briefed and argued together in the court below. On March 27, 1944, that court entered judgment sustaining the motion to dismiss (R. 98–99), and it is this judgment which is now before this Court for review.

SUMMARY OF ARGUMENT

I

Although a petition for review was filed in the court below within the time prescribed, that court then had no jurisdiction under Section 1141 of the Internal Revenue Code, and Section 1141 (b), read together with Section 1142, does not permit a retroactive validation of the petition for review by a stipulation entered into after the appeal period. A contrary construction of Section 1141 and 1142 would, in effect, extend the period of limitation within which review may be sought,

thwart the legislative purpose to remove doubt as to the proper appellate court and safeguard the right to review, and be wholly inconsistent with the rules of seven circuit courts of appeals and those of the United States Court of Appeals for the District of Columbia, which require that the petition for review contain "the necessary allegations to establish venue." *Wegener* v. *Commissioner*, 119 F. 2d 49 (C. C. A. 5th), certiorari denied, 314 U. S. 643, was, therefore, incorrectly decided.

II

Like the statutory requirement that the petition for review be filed within three months of the decision of the Tax Court, the correlative requirement that the stipulation be entered into within that period is jurisdictional and can be waived by neither the Commissioner nor the taxpayer. This is so notwithstanding the designation of Section 1141 (b) as a "Venue" provision, for the concept of venue cannot be fully applied to appellate courts. Section 1141 (b) (2) "authorized the parties to control the venue only by stipulation conforming to its terms". *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483, 487. To allow a waiver of the time limitation would have the undesirable consequences which Congress sought to avoid by imposing the limitation. In the absence of an express statutory authorization to the Commissioner to waive the limitation, the well-settled rule that an

officer cannot waive a substantial right of the Government prompts the conclusion that no such authority was given.

ARGUMENT

I

SECTIONS 1141 AND 1142 OF THE INTERNAL REVENUE CODE REQUIRE THAT THE STIPULATION AS TO THE PROPER REVIEWING COURT BE ENTERED INTO WITHIN THREE MONTHS OF THE DECISION OF THE TAX COURT

The decision of the Tax Court which the petitioner sought to have the court below review is one involving tax liability for years in which the petitioner filed no tax return. Under paragraph 1 of Section 1141 (b) of the Internal Revenue Code, *supra*, pp. 2–3, the United States Court of Appeals for the District of Columbia is the proper court to review such a decision except that, pursuant to paragraph 2, the Commissioner and taxpayer may enter into a written stipulation designating any circuit court of appeals as the reviewing court. In the instant case, the parties entered into such a stipulation, designating the Circuit Court of Appeals for the Sixth Circuit as the reviewing court. This stipulation, however, was not entered into until after the expiration of the three-month appeal period allowed by Section 1142 of the Code, *supra*, p. 3, petitioner having filed a petition for review in the Sixth Circuit,

apparently without noting that Section 1141 (b) requires a stipulation designating that court as the reviewing court. The fact that the stipulation was not entered into before the expiration of the appeal period is fatal to the jurisdiction of the court below.

Since reference is made in Section 1142 to Section 1141, the two sections must necessarily be construed together. Section 1142 provides for review of a Tax Court decision "as provided in section 1141" if a petition for "such" review is filed within three months of the decision of the Tax Court. The review provided in Section 1141, in a case where no return has been filed, is review by the Court of Appeals for the District of Columbia or "any circuit court of appeals * * * which may be designated by the Commissioner and the taxpayer by stipulation in writing." Until a stipulation has been entered into, then, review may be had only in the Court of Appeals for the District of Columbia, and only a petition for "such" review (Section 1142, supra, p. 3) is an effective petition. Here the taxpayer filed no petition for review in the Court of Appeals for the District of Columbia within the three-month period prescribed, and the petition addressed to the Circuit Court of Appeals for the Sixth Circuit was not a petition for "such" review as is outlined in Section 1141. A stipulation entered into more than three months after

the decision of the Tax Court cannot validate a petition for review, which, when filed, was filed in the wrong appellate court, for, if it can, as the court below noted (R. 102), the effect would be to extend "indefinitely, subject only to the concurring will of the Commissioner and the taxpayer, the three months' period of limitation."

"Unless all earlier precedents are to be disregarded, this kind of appeal dates only from the moment when the petition, which is the originating paper, is lodged in the court which the law prescribed." *United Drug Co.* v. *Helvering*, 108 F. 2d 637, 638 (C. C. A. 2d).[1] Certainly, it would have been a novel procedural device if Congress had expressly provided that a petition for review, filed within three months of the decision of the Tax Court, is an effective instrument even though the petitioner and the court in which the petition was filed had no way of knowing whether the petition was filed in the proper court, and

[1] When filed, the petition for review, like the allowance of an application for an appeal or a notice of appeal (see, e. g., 3 Moore, *Federal Practice* (1938), pp. 3390, 3394; 10 Cyclopedia of Federal Procedure (2d Ed. 1933) 638; *McLish* v. *Roff*, 141 U. S. 661), constitutes a perfection of the appeal and transfers jurisdiction of the case to the court to which the petition is addressed. Further steps on appeal, such as the filing of the record, date from the time of filing the petition for review. See rules of court in note 6, *infra*. See also Rules of the Circuit Court of Appeals for the Second Circuit (September, 1938), Rule 36; Fifth Circuit (February 1, 1939), Rule 37; Eighth Circuit (May 31, 1942), Rule 26.

might not know for some time after the statutory period for review had expired. The statute which Congress enacted permits of no such construction.[2]

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[2] Convincing evidence of the unlikelihood that Congress contemplated that the stipulation might be entered into after the expiration of the appeal period is found in the analogous provision of Section 906 (g) of the Revenue Act of 1936, 49 Stat. 1648, 1750, 7 U. S. C. 648 (g), concerning claims for refund of processing taxes:

> A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction * * *.

Even if the three-month limitation cannot be read as literally applicable to the stipulation, though such a reading seems warranted, the fact that the jurisdiction of the circuit court of appeals in which the petition and transcript are filed is said to be exclusive negates any possibility that Congress contemplated that a stipulation might be entered into thereafter.

Subsection (b) of Section 1141, with which we are here concerned, originated as Section 1002 (d) of the Revenue Act of 1926, 44 Stat. 9, 110. This Court, in *Nash-Breyer Motor Co. v. Burnet*, 283 U. S. 483, 487, recognized that this provision was inserted "in order that any doubt as to the proper court may be removed * * *." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 36 (1939–1 Cum. Bull. (Part 2) 332, 359); see also H. Rep. No. 356, 69th Cong., 1st Sess., p. 54 (1939–1 Cum. Bull. (Part 2) 361, 379). By Section 519 of the Revenue Act of 1934, 48 Stat. 680, 761, the provision before this Court in the *Nash-Breyer* case was changed, in a manner which is of no significance in the case at bar,[1] to substantially the present language of Section 1141 (b) of the Internal Revenue Code. The amendment making the change was proposed on the floor of the Senate by Mr. Harrison, who stated in part (78 Cong. Rec. 6325):

> The amendment is proposed in order to remove doubt now existing in certain cases as to the proper court in which to appeal from a decision of the Board of Tax Appeals.

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[1] Section 1002 (d) of the Revenue Act of 1926 provided that a decision might be reviewed: "In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

Thus, there is paramount in the entire legislative history of the provision for a stipulation the purpose of removing doubt as to the proper reviewing court.[4] That purpose can be effectuated only by having the proper court determined before the expiration of the appeal period so that the appellant need not run the risk of losing his right of appeal altogether by taking an appeal to the wrong court. If the court in which the petition is filed does not have jurisdiction and the prescribed period within which the petition must be filed has run, the right of appeal is lost. It is essential, therefore, that the appellant know, within the statutory period, to which court he may properly appeal. A stipulation designating the proper court serves that purpose, but can be of no aid to the appellant, who must file his petition before that period expires, if it is not entered into before the expiration of the appeal period. This must be so; for if there is power in either the Commissioner or the taxpayer to enter into the

[4] The remainder of the legislative materials relating to Section 519 of the Revenue Act of 1934 affords no aid on the question of the time within which the stipulation must be entered into. Mr. Harrison's amendment was agreed to without further discussion (78 Cong. Rec. 6325), the conference report merely referred to it in general terms (H. Rep. No. 1385, 73d Cong., 2d sess., p. 28 (1939–1 Cum. Bull. (Part 2) 627, 636)), the conference committee recommended that the House recede with a change in the section number (*ibid.*), and the conference report was agreed to by the House (78 Cong. Rec. 7839–7840).

stipulation after the appeal period, there is, of course, the corollary power to refuse to enter into the stipulation. Hence, a petition filed in a court which is the proper court only if it is so stipulated may result in barring appellate review if one of the parties, after the statutory period, refuses to agree. Such a refusal, within the statutory period, leaves the appellant free to file his petition in one of the courts prescribed by Section 1141 (b) (1). Accordingly, the power of stipulation does not serve its purpose of protecting the appellant's right of appeal unless the statute is construed as limiting the exercise of that power to the appeal period.

Finally, a construction of the statute which would permit the stipulation to be entered into after the expiration of the appeal period would be wholly inconsistent with the rules of seven circuit courts of appeals and those of the United States Court of Appeals for the District of Columbia. The rules of these courts, promulgated

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[5] Neither the Tax Court nor a circuit court of appeals may amend the petition and transfer jurisdiction to another circuit court of appeals. *Nash-Breyer Motor Co.* v. *Commissioner*, 20 B. T. A. 577; *Nash-Breyer Motor Co.* v. *Commissioner*, 42 F. 2d 192 (C. C. A. 2d); *Nash-Breyer Motor Co.* v. *Commissioner*, 44 F. 2d 376 (C. C. A. 9th). A second court can acquire jurisdiction only by the filing of a petition for review in that court within the three-month appeal period allowed by Section 1142. *Nash-Breyer Motor Co.* v. *Commissioner*, 61 F. 2d 1036 (C. C. A. 9th), where a petition had been filed in the Second Circuit within the appeal period.

under the authority of Section 1141 (c) (2) of the Internal Revenue Code (26 U. S. C. 1141 (c) (2)), require that a petition for review of a decision of the Board of Tax Appeals (now the Tax Court of the United States) contain "the necessary allegations to establish venue."* Manifestly, a petition for review, filed in a court which is proper only if a stipulation makes it so, cannot be filed in conformity with these rules unless the stipulation has already been entered into.

Whether the inference drawn from these rules be that all of these courts have construed Section 1141 (b) (2) as did the court below in this case, or merely that the necessities of wise and efficient judicial administration led these courts to impose this requirement, the materiality and persuasiveness of the rules can not be gainsaid. Even if the words of the statute and its legislative history do not alone compel the conclusion that the stipulation must be entered into within the statutory period, the view of those charged by the statute

* Rules of the Circuit Court of Appeals for the First Circuit (September 20, 1940), Rule 20; Third Circuit (February 4, 1942), Rule 19; Fourth Circuit (October 21, 1941), Rule 28; Sixth Circuit (January 1, 1940), Rule 14; Seventh Circuit (December 1, 1941), Rule 33; Ninth Circuit (March, 1943), Rule 30; Tenth Circuit (November 18, 1943), Rule 33; Court of Appeals for the District of Columbia (March 13, 1941), Rule 36 ("state the necessary facts to establish jurisdiction").

with the duty of formulating procedural rules for the review of Tax Court decisions is of the utmost value as an aid to a decision as to the meaning of the statutory provisions. Cf. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315.

The decision of the Circuit Court of Appeals for the Fifth Circuit in *Wegener* v. *Commissioner*, 119 F. 2d 49, certiorari denied, 314 U. S. 643, upon which petitioner relies, requires little comment.[1] The holding in that case was contrary to the holding of the court below in this case, but, in explanation of its conclusion, the court in the *Wegener* case merely stated that Section 1141 "fixes no time for making the agreement" and that the court found "no reason for writing such a limitation into the statute" (p. 49). As we have shown, Section 1141 must be considered in conjunction with Section 1142 and, when so considered, the conclusion is inescapable that the power to enter into a valid stipulation is circumscribed by the time limitation prescribed for appeal. While that conclusion may not be a happy one for this petitioner, it is a desirable one from the standpoint of orderly and proper administration of the tax laws.

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[1] This decision was against the taxpayer on the merits and it was the taxpayer who petitioned for a writ of certiorari. Accordingly, the present question was not involved in the petition.

II

NEITHER THE COMMISSIONER NOR THE TAXPAYER MAY WAIVE THE STATUTORY REQUIREMENT THAT THE STIPULATION BE ENTERED INTO WITHIN THE THREE MONTH PERIOD

As we have attempted to show, the statutory provision for stipulation of the proper reviewing court is necessarily intertwined with the provision that petitions for review must be filed within three months of the decision of the Tax Court. It is clear that the time limitation contained in Section 1142, like that imposed in other appeal provisions,[8] is jurisdictional,[9] and, as such, cannot be waived by the parties.[10] So also, "The legislative policy of speeding the disposal of income tax controversies by limiting the time for review" may not be nullified by allowing the parties to

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[8] See, e. g., *U. S. ex rel. Coy* v. *United States*, 316 U. S. 342; *Matton Co.* v. *Murphy*, 319 U. S. 412; *Nye* v. *United States*, 313 U. S. 33; *State of Missouri* v. *Todd*, 122 F. 2d 804, 807 (C. C. A. 8th); *Crump* v. *Hill*, 104 F. 2d 36 (C. C. A. 5th); *Miller* v. *United States*, 104 F. 2d 343 (C. C. A. 5th), certiorari denied, 308 U. S. 549, rehearing denied, 308 U. S. 634.

[9] *Forest Glen Creamery Co.* v. *Commissioner*, 123 F. 2d 522 (C. C. A. 7th); *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. C. A. 5th); *United Drug Co.* v. *Helvering*, 108 F. 2d 637 (C. C. A. 2d); *Smith* v. *Commissioner*, 67 F. 2d 467 (C. C. A. 4th); *Virginia Lincoln Furniture Corp.* v. *Commissioner*, 67 F. 2d 8 (C. C. A. 4th).

[10] *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 18; *443 Cans of Egg Product*, 226 U. S. 172, 184; *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149; *In re Moore*, 209 U. S. 490.

stipulate as to the proper appellate court after the time to petition for review has expired. Cf. *Commissioner* v. *Realty Operators,* 118 F. 2d 286, 288 (C. C. A. 5th); *Matton Co.* v. *Murphy,* 319 U. S. 412, 415.

This is so notwithstanding the designation of Section 1141 (b) in the Internal Revenue Code as a "Venue" provision.[11] In the usual sense

[11] While in 1933, Section 1002 of the Revenue Act of 1926, the predecessor of Section 1141 (b) of the Internal Revenue Code, was referred to in terms of jurisdiction rather than of venue in the Preliminary Report of a Subcommittee of the Committee on Ways and Means on Prevention of Tax Avoidance, 73d Cong., 2d Sess., p. 23, and in the Statement of the Acting Secretary of the Treasury regarding the subcommittee's report (pp. 15–16), the Conference Report on the provision which became Section 519 of the Revenue Act of 1934 described that section as a "venue" provision. H. Rep. No. 1385, 73d Cong., 2d sess., p. 28 (1939–1 Cum. Bull. (Part 2) 627, 636).

On the floor of the Senate, however, Mr. Harrison explained (78 Cong. Rec. 6325) that:

> The existing law is further amended so as expressly to grant permission to the Commissioner and the taxpayer to reach an agreement and stipulate that any circuit court of appeals will have *jurisdiction*, or to stipulate that the Court of Appeals of the District of Columbia will have *jurisdiction, regardless of whether or not the court so stipulated would otherwise have jurisdiction to review the decision.* [Italics supplied.]

The provisions for stipulations contained in Section 906 (g) of the Revenue Act of 1936, 49 Stat. 1648, 1750, 7 U. S. C. 648 (g), and Section 510 of the Revenue Act of 1942, 56 Stat. 798, 969, 7 U. S. C. (Supp. III) 648 (g), which prescribe the procedure on claims for refund of processing taxes, though substantially identical with the

in which the word is used, "venue" connotes the locality or place, where a defendant should be sued.[12] This connotation is carried into Section 1141 (b) in that the designation of the particular court which may review a decision of the Tax Court is in part to be determined by place. The idea of controlling jurisdiction by consent of the parties is also one which stems from the venue doctrine. Venue statutes give a defendant the right to object to suit in a court other than that in the proper venue. If the defendant makes seasonable and proper objection, the court, even though it has general jurisdiction otherwise, is required to relinquish jurisdiction. Conversely, the defendant may waive venue (see cases cited in note 12, *supra*) and the court in which suit is brought, if it has jurisdiction of the subject matter, may proceed to entertain the suit. Hence, the defendant may, by his consent or timely objection to improper venue, control the jurisdiction of a particular court to assume trial jurisdiction. This is similar to the right given the Commis-

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provisions of Sections 1141 and 1142 of the Internal Revenue Code, are not styled "venue" provisions, nor is the word "venue" used in the texts.

[12] *Ex parte Schollenberger*, 96 U. S. 369, 378; *Charlotte National Bank* v. *Morgan*, 132 U. S. 141, 145; *St. Louis &c Railway* v. *McBride*, 141 U. S. 127, 131; *In re Moore*, 209 U. S. 490, 501–508; *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211–212; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168.

sioner and taxpayer under Section 1141 (b) to confer jurisdiction upon a circuit court of appeals by entering into a stipulation designating the particular court as the reviewing court.

The adoption of the venue doctrine goes no further. Assuming the extraordinary conclusion that a distinction can be drawn between jurisdiction of the subject matter and jurisdiction of a particular court in appellate proceedings [13] and that Section 1141 confers jurisdiction over the subject matter on all of the circuit courts of appeals and the Court of Appeals for the District of Columbia, the provision for stipulation is not a counterpart of the right to object to or waive venue in the district courts.[14] What the Section does, plainly, is to confer the authority to select

[13] Although Section 128 (a) of the Judicial Code (28 U.S.C. 225 (a)), for example, grants to "the circuit courts of appeal" "jurisdiction" to review final decisions of the district courts, it has never been suggested that review may be had in a circuit court of appeals other than that designated by Section 128 (d). See also Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), sec. 206.

[14] The venue theory has always been applied in trial courts and has never been conceived to be applicable to appellate proceedings. It is based on a distinction between two types of jurisdiction and assumes recourse to another court, as we have shown. Effective jurisdiction over an appeal, however, is vested in only one court. An appeal to the wrong court, regardless of its "general jurisdiction" over the subject matter (see *supra*, note 13) is ineffective. The plaintiff in the trial court, on the other hand, may bring suit in a court in which venue is not properly laid, if the defendant does not object.

the proper reviewing court. Paragraph 1, specifies that "Except as provided in paragraph 2," a no-return case may be reviewed by the Court of Appeals for the District of Columbia. Thus, if, pursuant to paragraph 2, the parties, by written stipulation, designate a certain circuit court of appeals as the proper reviewing court, the Court of Appeals for the District of Columbia is not the proper reviewing court. The result is that only one court can be the proper one to review any given decision of the Tax Court.

The authority to designate a proper court by stipulation is not the authority to waive the statutory requirement that the proper court be designated within the appeal period. Section 1141 (b) (2) "authorized the parties to control the venue only by stipulation conforming to its terms." *Nash-Breyer Co.* v. *Burnet*, 283 U. S. 483, 487. The considerations, detailed above (*supra*, pp. 9–15), which compel the conclusion that the statute requires that the stipulation be entered into within three months of the decision of the Tax Court, are of equal significance in determining whether the parties may waive this requirement. The stipulation entered into after the statutory period cannot revive a petition for review timely filed, but in the wrong court; if the stipulation may be entered into after the appeal period, doubt as to the proper court in which to file the petition for review is not removed, and the Congressional

purpose is thwarted. Thus the circuit courts of appeals have uniformly considered the stipulation provision as jurisdictional.[15] *Massachusetts Fire & Marine Ins. Co.* v. *Commissioner*, 42 F. 2d 189 (C. C. A. 2d); *Spring Canyon Coal Co.* v. *Commissioner*, 38 F. 2d 764 (C. C. A. 8th); *Grain King Mfg Co.* v. *Commissioner*, 47 F. 2d 608 (C. C. A. 2d); *Holmstrom* v. *Commissioner*, 94 F. 2d 747 (C. C. A. 3d).

A further factor impels the conclusion that the power of stipulation may not validly be exercised after the expiration of the appeal period. At that time, the petition for review having been filed in the wrong court, the Government acquires a right to a dismissal, whereupon the decision of the Tax Court becomes final, and the action of the Commissioner in stipulating after the expiration of the appeal period would, if valid, result in a waiver of that right. It is, however, well settled that an administrative officer of the Government cannot waive a substantial right of the Government. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Munro* v. *United States*, 303 U. S. 36; *Finn* v. *United States*, 123 U. S. 227; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409;

[15] *Wegener* v. *Commissioner*, *supra*, p. 15, is no exception. The decision in that case was based simply on the view that the jurisdictional requirement did not include a limitation on the time within which the stipulation must be entered into.

Connell v. *Hopkins*, 43 F. 2d 773 (N. D. Tex.); *New England Furniture & Carpet Co.* v. *United States*, 2 F. Supp. 650, 651 (D. Minn.). See also *Minnesota* v. *United States*, 305 U. S. 382, 388–389. Since no exception to this rule is expressly contained in Section 1141, it would seem that the rule must be given full effect. At the very least, it is a weighty consideration when taken in conjunction with the express language of Section 1142 and the expressed purpose of Congress, shown above. The result is that the proper construction of Section 1141 (b) (2) is that Congress limited the parties' authority to stipulate to the time prescribed for appeal.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1944.

Industrial Addition Association, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 2, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

In this case petitioner, deeming itself exempt from income and excess profits taxes, failed to file any tax returns for the years 1932 to 1936 inclusive. The Commissioner assessed petitioner for the taxes for those years, with peralties, and the Tax Court has sustained the assessment as to the income taxes and attendant penalties. Petitioner, within the three months allowed for that purpose by § 1142 of the Internal Revenue Code, sought review of the Tax Court's decision by a petition for review filed with the Court of Appeals for the Sixth Circuit.

By § 1141 (a) of the Internal Revenue Code, entitled "Jurisdiction", the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia are given "exclusive jurisdiction to review the decisions" of the Tax Court. Subsection (b) (1), entitled "Venue", provides that "such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect to which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia." Since petitioner filed no return, the Court of Appeals for the District of Columbia was the court of proper venue under this subsection. If petitioner had made a return, it would have been required to file it with a collector whose office was within the sixth circuit, that of the court below; in that event, that court would have been the court of proper venue. The Code provides further, in subsection (b) (2): "Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any Circuit Court of Appeals . . . which may be designated by the Commissioner and the taxpayer by stipulation in writing."

The Commissioner suggested to petitioner that as it had filed no returns for the years in question and no written stipulation had been entered into as permitted by subsection (b) (2), the Circuit Court of Appeals for the Sixth Circuit was without "jurisdiction". In response to this suggestion, petitioner and the Commissioner, after the expiration of the three months period in which a petition for review could be filed, entered into such a written stipulation, designating the Court of Appeals for the Sixth Circuit as the court to review the decision of the Tax Court. The stipulation reserved to the Commissioner the right to challenge its timeliness and legal effect.

The Court of Appeals for the Sixth Circuit, on the Commissioner's motion, dismissed the petition for review for want of jurisdiction. 141 F. 2d 636. We granted certiorari, 323 U. S. —, to resolve an asserted conflict of the decision below, with that of the Court of Appeals for the Fifth Circuit in *Wegener* v. *Commissioner*, 119 F. 2d 49. The question presented is whether the court below had jurisdiction of the petition for review of the decision of the Tax Court, notwithstanding petitioner's failure to file the stipulation during the three months period, within which review of the Tax Court's decision could be sought.

The use in juxtaposition, in the statute, of the terms "jurisdiction" and "venue" marks a significant distinction. On the one hand, the statute confers power on the Circuit Courts of Appeals generally, to act judicially on petitions for review presented to them—which is "jurisdiction". On the other, such of those courts as are specified by the statute, or the stipulation which it authorizes, are designated as the place where, for convenience of the courts or parties or both, the petition will be heard—which is "venue".[1] Want of jurisdiction, unlike want of venue, may not be cured by consent of the parties; but when the court has jurisdiction, it has power to decide the case brought before it, even though the court having venue is one sitting in another circuit. *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 272-273; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211-212; *General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 434-435; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167-168; *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 453. The right to have a cause heard

[1] See Peoria Railway Co. v. United States, 263 U. S. 528, 535-536, where this Court explained the same distinction made in the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. §§ 41(28), 43.

in the court of the proper venue may be lost unless seasonably asserted; and in that event, the court of trial having jurisdiction but not the proper venue may render a judgment binding on the parties. *General Investment Co.* v. *Lake Shore Ry., supra*, 272; *Commercial Ins. Co. v. Consolidated Stage Co.*, 278 U. S. 177, 179; *Freeman* v. *Bee Machine Co., supra*, 453. The government may waive objections to venue, just as any other litigant may. *United States* v. *Hvoslef*, 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 24-25; *Peoria Railway Co.* v. *United States*, 263 U. S. 528, 535-536, and here such waiver, by stipulation, is contemplated by § 1141(b)(2).

We have no reason to suppose that the terms "jurisdiction" and "venue" were used in the statute in other than their usually accepted meaning, and no convincing reason has been advanced why that meaning should not be accepted here. Unless these plain terms are to be disregarded, all the Circuit Courts of Appeals are given jurisdiction to review decisions of the Tax Court upon a petition for review, that is, power to act judicially upon the petition. *Peoria Railway Co.* v. *United States*, *supra*, 535-536. Consequently when in this case petitioner filed its petition with the Court of Appeals for the Sixth Circuit, that court did not lack power to proceed with the cause, although the court of proper venue was the Court of Appeals for the District of Columbia, as prescribed by § 1141(b)(1). The parties were free to waive this defect of venue, by filing the stipulation in compliance with subsection (b)(2), designating the court below as the one to act upon the petition, which was already before it and of which it then had jurisdiction.

The government urges that the stipulation here did not comply with § 1141(b)(2), since it was not filed within three months of the decision of the Tax Court. But § 1141(b)(2) does not by its terms place any time-limitation upon the filing of the stipulation. The government relies on the three months limitation in § 1142, which is in terms applicable only to the filing of the petition for review. The petition here was filed within three months in a court having jurisdiction, and we see no reason to import into the stipulation provision, § 1141(b)(2), a time limitation which it does not contain.

It is true, as the government argues, that dismissal for want of the proper venue of a petition for review pending in a Court of

Appeals, controls the jurisdiction of the court. But in such a case jurisdiction is controlled only by terminating it. Here the case was not dismissed before want of venue was supplied by stipulation in the manner authorized by the statute. This imposed on the court the duty to exercise its jurisdiction in deciding the case.

The government relies, as did the court below, on our decision in *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483. When that case arose, the provision in the applicable Revenue Act for choice of venue by stipulation of the parties, did not permit them to stipulate for review in any circuit, but limited their choice to two specified circuits. The parties in that case stipulated for review of a decision of the Board of Tax Appeals in a circuit not authorized by the statute, and thus did not conform to the statutory venue requirement. We sustained the action of the Court of Appeals in dismissing the petition for review on the ground that the court was not bound to exercise its jurisdiction where the proper venue was in another court, saying, p. 487: "The restriction on the power of the parties to stipulate as to venue would be meaningless if they could waive it without the consent of the court." In this case the stipulation conforms to the statute, and is without the infirmity found to be fatal in the *Nash-Breyer* case.

Here the court acquired jurisdiction of the cause under the statute by the timely filing of the petition for review, and the parties were authorized by § 1141(b)(2) to stipulate that the review should be had in that court. On filing the stipulation the cause was then pending in the court having venue, as well as jurisdiction, and the case was improperly dismissed.

Reversed.